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ALEXANDER L. STEVENS
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No. ...-

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES POSTAL SERVICE,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT.

OR IN THE ALTERNATIVE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Is California prohibited by the doctrine of pre-emption from using its Order To Withhold to garnish the wages of Postal Service employees to collect delinquent income taxes notwithstanding the fact that:
 - a. At least seven separate Circuit Courts of Appeal have held that ordinary judgment creditors may garnish the wages of these same Postal Service employees.
 - b. The California statute which authorizes said collection (California Revenue & Taxation Code § 18817) pertains only to the collection of *delinquent* income taxes and thus cannot conflict with 5 U.S.C. 5517 which deals with a totally separate area, to wit, the withholding of *current* anticipated tax liabilities.

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The United States Postal Service.

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Appellant,

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Appellee.

JURISDICTIONAL STATEMENT.

Appellant the Franchise Tax Board of the State of California appeals from the Opinion of the U.S. Court of Appeals for the Ninth Circuit entered February 10, 1983, or in the alternative respectfully prays that a Writ of Certiorari issue to review that Opinion, which holds that California Revenue & Taxation Code section 18817 is preempted by 5 U.S.C. § 5517 insofar as Revenue & Taxation Code section 18817 allows the Franchise Tax Board to garnish the wages of delinquent taxpayers who are employed by the United States Postal Service.

Appellant the Franchise Tax Board submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below.

The Opinion of the Court of Appeals (Appendix A, *infra*) was filed on February 10, 1983, and is reported at 698 F.2d 1029; that Court's Order Amending Opinion and Denying Rehearing (Appendix D, *infra*) was filed on June 3, 1983. The Judgment of the United States District Court for the Central District of

California (Appendix B, *infra*) was entered on July 9, 1980. The Findings of Fact and Conclusions of Law for the Central District of California (Appendix C, *infra*) were filed on August 6, 1980.

Jurisdiction.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on February 10, 1983. A timely Petition For Rehearing And Suggestion That Rehearing Be En Banc was filed on February 24, 1983. The Petition For Rehearing was denied on June 3, 1983.

Appellant filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on August 12, 1983, with the clerk, United States Court of Appeals for the Ninth Circuit. (Appendix E, *infra*.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue & Taxation Code § 18817 was preempted by 5 U.S.C. § 5517 insofar as it allowed the Franchise Tax Board to garnish the wages of United States Postal Service employees.

This Jurisdictional Statement is filed timely with this Court under the provisions of 28 U.S.C. § 2101(c).

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

"The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

California Revenue and Taxation Code section 18818 provides as follows:

"Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of notice pursuant to Section 18817 is liable for such amounts."

39 U.S.C. § 401 provides in pertinent part:

"The Postal Service shall have the following general powers:

"(1) to sue and be sued in its official name; . . ."

39 U.S.C. § 410 provides in pertinent part:

"(a) Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, . . . employees, . . . shall apply to the exercise of the powers of the Postal Service. . . ."

5 U.S.C. § 5517 provides in pertinent part:

"(a) When a State statute —

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made.

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section."

4 U.S.C. section 106 provides in pertinent part:

"No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

4 U.S.C. § 111 provides in pertinent part:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, . . . or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

31 C.F.R. section 215.12 provides in pertinent part:

"Nothing in this agreement shall be deemed:

- (a) To require collection by agencies of the United States of delinquent tax liabilities of Federal employees or members of the Armed Forces, or
- (b) To consent to the application of any provision of law of the State, city or county which has the effect of:
 - (1) Imposing more burdensome requirements upon the United States than it imposes on other employers, or
 - (2) subjecting the United States or any of its officers or employees to a penalty or liability. . . ."

Statement of the Case.

During July and August 1978, the Franchise Tax Board issued to the Postal Service four Orders to Withhold pursuant to § 18817 of the California Revenue and Taxation Code attempting to garnish wages of four of its tax debtors who were employed by the Postal Service. The Postal Service admitted that three of the four tax debtors were employed by the Postal Service. The Postal Service refused to honor the Franchise Tax Board's Orders, contending instead that any funds owed to the tax debtors-employees

were not subject to the Franchise Tax Board's Orders to Withhold.

On December 13, 1978, the Franchise Tax Board filed a complaint against the Postal Service for failure to deliver personal property levied upon. The Franchise Tax Board sought to recover the amount owed by the Postal Service to each of the four tax debtors at the time of the service of the respective Orders to Withhold up to the amount of delinquent taxes owed to the Franchise Tax Board.

In a similar proceeding, in February 1978, the Employment Development Department issued to the Postal Service two Notices of Levy pursuant to § 1755 of the California Unemployment Insurance Code, notifying the Postal Service that two of the latter's mail contractors were delinquent in paying taxes to the Employment Development Department and thereby attempted to levy upon the salary or accounts receivable paid or owed to these two tax debtors by the Postal Service. The Postal Service admitted that the two tax debtors were under contract with the Postal Service for the transport of mail. The Postal Service refused to honor either levy contending that no funds owing to the two tax debtors by the Postal Service were subject to garnishment or levy.

On October 19, 1978, the Employment Development Department filed a complaint against the Postal Service for failure to deliver personal property levied upon. The Employment Development Department sought to recover the amount owed to the two tax debtors by the Postal Service at the time of the service of the Notices of Levy up to the amount of delinquent taxes owed to the Employment Development Department.

On March 23, 1979, the Postal Service filed its Answer to both complaints. On November 1, 1979, the actions were consolidated.

On April 29, 1980, a motion for summary judgment was filed by the Franchise Tax Board and the Employment Development Department. On April 30, 1980, the Postal Service's motion for judgment on the pleadings or in the alternative for summary judgment was filed.

On July 9, 1980, Judgment was entered in favor of the Postal Service and against the Franchise Tax Board and the Employment Development Department dismissing the actions. On August 6,

1980, Findings of Fact and Conclusions of Law were filed by the Court.

On September 2, 1980, the Employment Development Department filed its Notice of Appeal to the Ninth Circuit. On September 3, 1980, the Franchise Tax Board filed its Notice of Appeal to the Ninth Circuit.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit on December 8, 1981. On February 10, 1983, the panel issued an opinion (one judge dissenting in part) affirming in part and reversing in part the opinion of the United States District Court. Specifically, the panel reversed the summary judgment of the United States District Court granted against the Employment Development Department and in favor of the U.S. Postal Service, and affirmed the summary judgment of the United States District Court granted against the Franchise Tax Board and in favor of the U.S. Postal Service. The dissenting Judge agreed with the majority opinion which reversed the summary judgment against the Employment Development Department but dissented from the majority opinion which affirmed the summary judgment against the Franchise Tax Board.

A Petition For Rehearing And Suggestion That Rehearing Be En Banc was timely filed by the Franchise Tax Board only. The panel issued an Order Amending Opinion And Denying Rehearing on June 3, 1983.

With regard to the Franchise Tax Board case, the Ninth Circuit Majority Opinion found that the Franchise Tax Board levies were prohibited by 5 U.S.C. § 5517 and apparently also by 31 C.F.R. § 215.12(a). The Majority Opinion did not discuss the decisions from the seven other circuits which have allowed private judgment creditors to garnish the wages of Postal Service employees.

The dissenting Judge in the Ninth Circuit Opinion below stated that 5 U.S.C. § 5517 was a limited waiver of sovereign immunity but that the Postal Reorganization Act waived Postal Service immunity without any qualification regarding state tax procedures. The dissenting Judge went on to point out that the federal courts have consistently held that 39 U.S.C. § 401(1) waives Postal Service immunity from state garnishment proceedings. The Judge concluded that the Franchise Tax Board's Order to With-

hold was essentially a garnishment procedure and he could see no reason why Congress would want to treat the Postal Service employees' tax debts any differently than it treats their other debts.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I. INTRODUCTORY STATEMENT.

A majority of the Ninth Circuit panel below has held that California's income tax levy statute, Revenue & Taxation Code § 18817 has been preempted by 5 U.S.C. § 5517 and thus California is prohibited from levying on the wages of United States Postal Service employees to collect delinquent taxes. This is in spite of the fact that the Postal Service honors wage garnishments from ordinary judgment creditors.

The Ninth Circuit panel erroneously has stated that Revenue and Taxation Code § 18817 and 5 U.S.C. § 5517 deal with the same subject matter. Specifically, the Ninth Circuit has held that Revenue and Taxation Code § 18817 which deals with the collection of *delinquent* state income taxes has been preempted by 5 U.S.C. § 5517 which deals only with withholding of *current* anticipated tax liabilities.

The majority Opinion of the Ninth Circuit panel is clearly erroneous and has created an anomalous situation.

This is the first time insofar as the Franchise Tax Board is aware, that any Circuit court has prohibited a levy or garnishment of the wages of Postal Service employees. Although seven separate other Circuit Courts have permitted private judgment creditors to garnish the wages of employees of the Postal Service for payment of *any* debts owed by the employees, the Ninth Circuit panel herein has barred the Franchise Tax Board from using its Order to Withhold to garnish those same wages of those *same* Postal Service employees for payment of state income taxes. In light of the vital importance of the prompt collection of state taxes and the absence of any qualification upon the waiver of sovereign immunity of the Postal Service in 39 U.S.C. § 401 et seq., the majority opinion must be reversed.

The Postal Reorganization Act of 1970 reorganized the functions of what previously was referred to as the United States Post Office into the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service and provided that it may "sue and be sued." The phrase "sue and

be sued" embraces all civil legal proceedings. *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292.

Relying on this waiver of sovereign immunity, at least seven Circuits have allowed ordinary judgment creditors to garnish the wages of Postal Service employees. The Ninth Circuit majority, however, has prohibited the Franchise Tax Board from using its Order to Withhold to levy on the wages of these Postal Service employees. The Ninth Circuit majority has held that the Franchise Tax Board's levy statutes are preempted by 5 U.S.C. § 5517, which statute authorizes the Secretary of the Treasury and the states to enter into contracts whereby federal agencies or instrumentalities agree to withhold current state income tax from the salaries of federal employees. As the Franchise Tax Board will discuss more fully *infra*, 5 U.S.C. § 5517 cannot preempt the Franchise Tax Board levy statutes because 5 U.S.C. § 5517 deals with the withholding of current anticipated income tax liabilities while the Franchise Tax Board levy statutes deal solely with the collection of delinquent taxes.

5 U.S.C. § 5517(b) provides that the United States does not consent to the application of a statute which imposes more burdensome requirements on the United States than on other employers or which subjects the United States or its employees to a penalty or liability because of 5 U.S.C. § 5517, the withholding section.

31 C.F.R. 215.12(a) provides, *inter alia*, that nothing under the withholding agreements executed pursuant to 5 U.S.C. § 5517 shall require United States agencies to collect delinquent tax liabilities of federal employees.

As the Franchise Tax Board will discuss more fully *infra*, no penalty is being imposed on the United States because of 5 U.S.C. § 5517 which deals with the withholding of current anticipated tax liabilities and the Franchise Tax Board is not using 5 U.S.C. § 5517 to require the Postal Service to collect delinquent taxes. Rather, the Franchise Tax Board is relying solely on its own statutes, Revenue and Taxation Code §§ 18817 and 18818 to require the Post Service to honor its levy for *delinquent*, not current, taxes. This is not prohibited and in fact is mandated by the Postal Reorganization Act which removed the Postal Service

from the political arena and authorized it to act as an independent establishment with powers equivalent to a private business enterprise. (*Beneficial Finance Co. of New York, Inc. v. Dallas* (2d Cir. 1978) 571 F.2d 125, 128.)

The Postal Service was "launched into the commercial world" under the Postal Reorganization Act. (See *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *Goodman's Furniture Company v. United States Postal Serv.* (3rd Cir. 1977) 561 F.2d 462, 464; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1148; *Beneficial Finance Co. of New York, Inc. v. Dallas* (supra) 571 F.2d 125, 128.)

The Postal Service is now akin to any other employer in the commercial world and since all other employers are required to honor the Franchise Tax Board's levy, there is no reason in law or policy why the Postal Service should be exempt.

Section 401 of the Postal Reorganization Act of 1970 (39 U.S.C. § 401) waived the Postal Service's immunity from suit. Section 401 provides that the Postal Service may "sue and be sued" in its official name. As stated, at least seven other Circuits have allowed judgment creditors to levy on Postal Service employees' wages.

The only difference between the Franchise Tax Board's levy and that of other general creditors is that the general creditors have obtained a court judgment before they have garnished the employees' wages while the Franchise Tax Board is not required to obtain a court judgment before it can issue a levy to collect its tax. As the Board will discuss more fully, *infra*, after a tax liability has become due and payable (here the taxpayers filed no-remittance returns in which they assessed themselves their tax liability), the Board has the equivalent of a judgment and has all of the remedies of a judgment creditor. Thus it is not necessary for the Board to obtain a court judgment before it levies on the wages of a delinquent taxpayer.

Moreover, the Ninth Circuit has long recognized that the Franchise Tax Board's Order To Withhold is like post-judgment execution. *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382. In addition, the Ninth Circuit

has expressly rejected the argument that a tax debt must be supported by a court judgment before collection of that debt may be attempted. *Bomher v. Reagan* (9th Cir. 1975) 522 F.2d 1201, 1201-2.

At the outset, it must again be emphasized that 5 U.S.C. § 5517 cannot preempt Revenue and Taxation Code § 18817 because it does not deal with the same subject matter. The collection of current anticipated tax liability through withholding and the collection of delinquent tax liabilities through the garnishment of the tax debtor's wages are two separate procedures. The Order To Withhold authorized by Revenue & Taxation Code section 18817 pertains to the collection of *delinquent* tax liabilities. However, 5 U.S.C. § 5517 is only involved with current anticipated tax liabilities and gives *all* federal agencies the authority to withhold anticipated state income tax liabilities from current earnings. 5 U.S.C. § 5517 provides that the United States is to be treated as any other employer but is not to be subject to a penalty or liability *because of that section*.

Thus, with regard to the withholding of current anticipated tax liability, the United States under 5 U.S.C. § 5517 has waived its sovereign immunity to a limited degree. However, this case does not deal with the withholding of current anticipated tax liability and the Board is not relying on 5 U.S.C. § 5517 to require the Postal Service to remit to the Board the delinquent tax liabilities of Postal Service employees.

In 1978, the Board issued four "Orders To Withhold" to the Postal Service pursuant to Revenue and Taxation Code § 18817. These orders notified the Postal Service that four individual employees were delinquent in paying their California income taxes. The orders constituted levies on any payments (generally salary) owed by the Postal Service to the four employees. The orders attempted to collect *delinquent* income taxes. The orders were not used to collect present estimated tax liability.

The distinction between garnishment of wages to satisfy delinquent tax liabilities on the one hand and payroll withholding to satisfy current anticipated tax liabilities on the other, is crucial. While 5 U.S.C. § 5517 does not *authorize* garnishment of federal employees' wages for delinquent state tax debts, it does not *prohibit* such garnishment if permissible under other statutes (e.g., 39 U.S.C. § 401(1)).

The Postal Service has contended below that it cannot honor the Franchise Tax Board's levy because of 31 C.F.R. § 215.12 which states that nothing under the withholding agreements, (executed pursuant to 5 U.S.C. § 5517) shall require United States agencies to collect delinquent tax liabilities of federal employees. However, the Postal Service also admitted at oral argument at the district court level that had the Franchise Tax Board obtained a court judgment, it would have been honored. (Appendix F, *infra*.)

This admission leaves the Postal Service in the untenable position of arguing that it is prohibited from collecting delinquent tax liabilities pursuant to 31 C.F.R. § 215.12, yet admitting that it would honor the Franchise Tax Board levy anyway if the Franchise Tax Board obtained a technical court judgment. There is no logic in this argument.

Furthermore, it is clear that the Board's levy of the wages of Postal Service employees is specifically allowed by 39 U.S.C. section 401(1) which waives the Postal Service's immunity from suit and provides that the Postal Service may "sue and be sued." The Postal Reorganization Act of 1970 completely waived Postal Service immunity without any qualification regarding the collection of delinquent taxes. The Postal Service can "sue or be sued" like a private employer. 39 U.S.C. § 401(1); *See F.H.A. v. Burr* (1940) 309 U.S. 242, 245.

The Board respectfully contends that the majority Opinion has mischaracterized the position of the Board. The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has argued that 5 U.S.C. § 5517 only applies to current payroll withholding and by its terms does not prohibit wage garnishment for state taxes provided authority to garnish exists under the provisions of other statutes. Two separate sovereign immunities are involved in this case — 5 U.S.C. § 5517 and 39 U.S.C. § 401(1). The Board has pointed out that the sovereign immunity which was waived to a limited degree in 5 U.S.C. § 5517 applied to all federal agencies and pertained only to current payroll withholding of state taxes for those agencies. However, the sovereign

immunity which was waived in 39 U.S.C. § 401(1) is a *general* waiver of sovereign immunity which applies only to the Postal Service. This general waiver has been interpreted by Circuit Courts in at least seven of the Circuits as permitting garnishment of Postal employees' wages. There is no qualification on this waiver of sovereign immunity. Moreover, there is no qualification or limitation on the type of debts which can be garnished from Postal employees' wages.¹ Logically speaking, there is no reason to treat Postal employees' commercial debts any differently than their tax debts. Indeed, the majority Opinion has placed these tax debts on a lower plane than commercial debts which is completely contrary to long established authority.

There is also a serious question whether 5 U.S.C. § 5517 even applies to the Postal Service in light of 39 U.S.C. § 410 which provides in pertinent part as follows:

“Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts . . . employees . . . or funds . . . shall apply to the exercise of the powers of the Postal Service.”

The Ninth Circuit panel found that the Postal Service did continue to honor the withholding contracts. The Board respectfully contends, however, that this voluntary compliance cannot be used by the Postal Service to preempt California statute to cause California's statute to be preempted.

It must be kept in mind that the Board is not seeking to impose a tax on the Postal Service. It is merely seeking to collect a valid income tax from the Postal Service employees by having the

¹Compare 38 U.S.C. § 1820(a)(1) which includes a “sue and be sued” clause applicable to the Veteran’s Administration. Following a district court decision upholding wage garnishments under that statute against VA employees, the statute was amended to “qualify” the “sue and be sued” clause explicitly stating that wage garnishments were not permitted under the authority of that statute. *See, May Dept. Stores Co. v. Smith* (8th Cir. 1978) 572 F.2d 1275, 1277 cert. denied (1978) 439 U.S. 837.

Obviously, if a qualification of the Postal Service’s “sue and be sued” clause was intended for tax debts, Congress could have so amended 39 U.S.C. § 401(1).

Postal Service transmit *property belonging to the tax debtor-employees* to the Board. The distinction between the taxation of private interests and the taxation of governmental interests is fundamental in the application of the intergovernmental immunity doctrine. *U.S. v. Allegheny County* (1944) 322 U.S. 174, 186. The "legal incidence" of the Board's tax is clearly upon the employees under the principles recently set forth in *United States v. Mississippi Tax Comm'n* (1975) 421 U.S. 599, 608. The mere fact that collection of the tax is being attempted from property belonging to the employees and held by the Postal Service does not alter this result.

The Board believes this matter is appropriate for hearing by this Court. The exceptional importance of the collection of state taxes is not a matter which should be lightly cast aside. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means of collection of these liabilities must be preserved not only for California but also for any other state in which Postal employees reside.

The State of California has a vital interest in collecting taxes from its taxpayers. This vital interest which is shared by all other states and taxing authorities was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." (*Dows, supra*, 78 U.S. at 110.)

This Court also stated that "[T]he prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government." (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 261;

Accord *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

In all, the anomalous situation which the majority Opinion has created is simply unsupported by the record and the law. 5 U.S.C. § 5517 and 39 U.S.C. § 401(1) can peacefully coexist.² Wage garnishments for state tax debts of Postal employees simply do not run afoul of § 5517 because they are authorized by 39 U.S.C. § 401(1).

To summarize, the Franchise Tax Board believes that this Court should note probable jurisdiction and allow full briefing and oral argument for the following reasons:

1. The Postal Reorganization Act waived generally the sovereign immunity of the Postal Service. At least seven other Circuits have held that ordinary judgment creditors may garnish the wages of Postal Service employees. As such the Franchise Tax Board should be permitted to use its Order to Withhold to garnish the earnings of the employees of the Postal Service.
2. The collection of state taxes is a matter of extreme importance. Before an infringement upon that vital right may be permitted, it must be clearly demonstrated that indeed a federal statute such as 5 U.S.C. § 5517 was intended to expressly *limit* that right. However, in this instance, § 5517 was not intended to limit the collection of state taxes; rather it was meant to facilitate that collection through payroll withholding. Contrary to

²Compare an analogous situation where the Postal Service argued unsuccessfully that 42 U.S.C. § 659 (statute authorizing wage garnishment for alimony and child support debts for all federal employees) barred garnishment of Postal employees' wages for commercial debts. In *Iowa-Des Moines Nat. Bank v. United States* (S.D. Iowa, 1976) 414 F.Supp. 1393, the Court held that since the Postal Service had already consented to "sue and be sued," in 39 U.S.C. § 401(1), the consent of the United States in 42 U.S.C. § 659 (for alimony and child support debts) is *superfluous* insofar as garnishments against the Postal Service are concerned. 414 F.Supp. at 1397.

Similarly, 5 U.S.C. § 5517 may well be *superfluous* insofar as the Postal Service is concerned since all that statute is imposing upon the Postal Service is the duties and responsibilities required of any private employer. The same can be said for California Revenue & Taxation Code section 18817.

the majority Opinion, § 5517 was not intended to restrict the collection of delinquent state tax liabilities where such collection is authorized under the provisions of another Act of Congress such as 39 U.S.C. § 401(1). The Franchise Tax Board seeks only to be permitted to treat the Postal Service as it would a private employer or enterprise. In light of the Postal Reorganization Act such a treatment is completely warranted if not mandated.

3. The majority Opinion has created an anomalous situation where the Order to Withhold is not being honored to collect the tax debts of Postal employees yet garnishments to collect commercial debts are being honored. This is completely unwarranted and in fact conflicts with longstanding authority regarding the preeminence of tax debts.

4. The majority Opinion has disregarded the Postal Service's concession that garnishment of Postal employees' wages was permissible, even in light of their 5 U.S.C. § 5517 argument, if the Board obtained a court judgment for taxes. This admission means that the Franchise Tax Board cannot be preempted by 5 U.S.C. § 5517.

5. Finally, as Postal employees reside and are required to pay state and local taxes not only in California but also in virtually all of the States, the problem of how to collect these delinquent liabilities is not exclusive to California.

II.

CALIFORNIA'S LEVY STATUTE IS NOT PREEMPTED BY 5 U.S.C. § 5517.

A. Wage Garnishment and Payroll Withholding Do Not Involve the Same Subject Matter.

In reaching its conclusion that 5 U.S.C. § 5517 preempts the Board's wage garnishments under California Revenue & Taxation Code § 18817, the majority opinion has incorrectly stated that §§ 5517 and 18817 deal with the same subject matter. However, 5 U.S.C. § 5517 is only involved with payroll withholding of current anticipated tax liabilities. It neither prohibits nor permits wage garnishment of delinquent tax liabilities. Section 18817 is only involved with the collection of delinquent tax liabilities. The State of California has a full scheme of payroll withholding statutes patterned after the Internal Revenue Code designed for the

collection of current anticipated tax liabilities. Section 18817 is not part of that scheme.

5 U.S.C. § 5517 was enacted originally in 1952 as 5 U.S.C. § 84b. It was enacted in order for the federal government to cooperate with state tax wage withholding programs with respect to federal employees. In fact, the Congressional debate with regard to § 5517 made it clear that it has been the longstanding policy of Congress "not to interfere with the enforcement or collection of state income tax laws." *Lung v. O'Cheskey* (D.N.M. 1973) 358 F.Supp. 928, 932, Affirmed (1973) 414 U.S. 802.

The legislative history of 5 U.S.C. § 5517 is clear that current payroll withholding akin to the income tax withholding provisions of the Internal Revenue Code (codified at 26 U.S.C. §§ 3401 et seq.) was the sole aim of the legislators. The following statement by Representative Prouty, from Vermont, is illustrative: "The enactment of S. 1999 would accord to the States the same co-operation in tax collections which the Federal Government demands from them . . . and therefore increase the revenue of State governments, lessening their dependence on the Federal Government and strengthening our system of duality of sovereignty." (98 Cong. Record-House 9374 (1952).)

Furthermore, the legislative history indicates that Section 5517 was enacted because Congress believed that without the statute, federal agencies lacked authority to withhold state income taxes from the wages of their employees. See, 98 Cong. Record-House 9374 (1952); Sen. Rept. No. 1309 reprinted in 2 U.S. Code Congressional and Admin. News 2360 (1952); House Rept. No. 2474 reprinted in 2 U.S. Code Congressional and Admin. News 2434 (1952). As such, section 5517 was a limited waiver of sovereign immunity for all federal agencies solely in the area of payroll withholding of current anticipated tax liabilities.

The Ninth Circuit's holding that current withholding and levying statutes cover the same subject matter is erroneous. Payroll withholding under California Law is a relatively recent phenomenon in that it was not until 1972 that it commenced with respect to California residents. California Revenue & Taxation Code section 18806 (as it read prior to 1980 repeal and reenactment). On the other hand, the Franchise Tax Board's garnishment pro-

vision under § 18817 has been in existence for some forty years. Currently, payroll withholding is administered by the Employment Development Department and the pertinent statutes are now found in California Unemployment Insurance Code § 13000, et seq. Moreover, wage garnishments for taxes are now controlled by provisions of California Code of Civil Procedure § 723.070, et seq. This plainly indicates that the placement of the prior California payroll withholding provisions (§§ 18805-18816) under the same Article and Chapter of the California Revenue and Taxation Code as the prior garnishment provisions (§§ 18817-18819) simply does not mean that they involve the same subject matter.

To further demonstrate the diverse nature of payroll withholding and wage garnishment it should be noted that federal payroll withholding and federal wage garnishments for taxes do not appear in the same Subtitle much less same Chapter of the Internal Revenue Code. The payroll withholding provisions can be found at 26 U.S.C. § 3401, et seq. These provisions are located in Chapter 24 of Subtitle C of the Code. However, the Internal Revenue Service's wage garnishment provisions are found in Chapter 64 of Subtitle F at 26 U.S.C. § 6331, et seq. The California payroll withholding and garnishment provisions were patterned after the Internal Revenue Code.

With regard to *withholding*, compare:

1. California Revenue & Taxation Code § 18806 (the former withholding statute)
2. California Unemployment Insurance Code §§ 13020-13031 (the present withholding statutes)
3. 26 U.S.C. § 3402 (the present Internal Revenue Service withholding statute)

With regard to the definition of wages, compare:

1. California Revenue & Taxation Code § 18807 (the former statute)
2. California Unemployment Insurance Code § 13009 (the present statute)
3. 26 U.S.C. § 3401(a)

With regard to *garnishment*, compare:

1. California Revenue & Taxation Code § 18817 with 26 U.S.C. § 6331(a) & (d) (authorization to levy)
2. California Revenue & Taxation Code § 18818 with 26 U.S.C. § 6332(c)(1) (liability for failure to honor levy)
3. California Revenue & Taxation Code § 18819 with 26 U.S.C. § 6332(a) & (d) (Prohibition of liability to delinquent taxpayer for complying with levy)

As the Franchise Tax Board has stated, 5 U.S.C. § 5517 applies *only* to wage withholding of state taxes. It does not apply to the collection of delinquent tax liabilities nor does it apply to any other collection remedy possessed by the Board.

It is at this point that the nature of the Postal Service becomes important. It has been unanimously held by every federal court of appeal which has considered the issue, that the Postal Service's sovereign immunity was generally waived by the Postal Reorganization Act of 1970 (Public Law 91-375, codified at 39 U.S.C. § 101, et seq.). *Beneficial Finance Co. of New York, Inc. v. Dallas* (2d Cir. 1978) 571 F.2d 125, 127-8. Therefore, unlike other federal agencies which will retain their sovereign immunity (other than that which was waived by 5 U.S.C. § 5517), the Postal Service is amenable to the use of the other state tax collection devices mentioned above.

In the instant matter, the Board has utilized its Order to Withhold which is like post-judgment execution. *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, 382. The Order to Withhold, unlike the wage withholding provisions of 5 U.S.C. § 5517, reaches "any credits or other personal property or other things of value, belonging to a taxpayer." California Revenue and Taxation Code § 18817. The Order To Withhold is a collection device which can be used to collect delinquent tax liabilities. The wage withholding provisions of 5 U.S.C. § 5517 cannot be so used. See, 31 C.F.R. § 215.12. The Postal Service has attempted to extend 5 U.S.C. § 5517 far beyond its legislative intent. 5 U.S.C. § 5517 pertains only to payroll wage withholding and has no applicability with respect to the collection of delinquent tax liabilities.

Plainly, the majority's analysis in attempting to find a conflict between 5 U.S.C. § 5517 and California Revenue & Taxation

Code § 18817 is faulty. Payroll withholding is not the same as wage garnishment. Section 5517 does not deal with wage garnishment nor does it purport to prohibit wage garnishment for federal employees where such is authorized under some other statute.

B. As There Is No Actual Conflict Between 5 U.S.C. § 5517 and California Revenue and Taxation Code Sections 18817-18818, the Supremacy Clause Does Not Bar the Board's Action Herein.

One critical preliminary question which must be answered in any matter when the preemption of state statutes by federal statutes is alleged is whether there really is a conflict between the statutes. It is the Board's position that a close scrutiny of 5 U.S.C. § 5517 will reveal that no conflict exists.

The Board is *not* seeking to impose any liability upon the Postal Service because of the latter's failure to abide by 5 U.S.C. § 5517. Additionally, the Board is not seeking to require collection of delinquent tax liabilities under authority of the 5 U.S.C. § 5517 wage withholding agreement. That agreement has *nothing* to do with whether the Board can collect delinquent tax liabilities through its Order to Withhold statutes.

In deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause, it is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict. *Perez v. Campbell* (1971) 402 U.S. 637, 644. The court's function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines. v. Davidowitz* (1941) 312 U.S. 52, 67; Accord, *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158. An unconstitutional conflict will be found where compliance with both the federal and state statutes is a physical impossibility. *Florida Growers v. Paul* (1963) 373 U.S. 132, 142-3.

It will *not be presumed* that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so, since the exercise of

federal supremacy is not lightly to be presumed. *Schwartz v. Texas* (1952) 344 U.S. 199, 202-3. Conflicts between state and federal statutes should *not* be sought out where *none clearly exists*. *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967.

Subdivision (b) is the portion of 5 U.S.C. § 5517 which the Ninth Circuit majority found to conflict with California Revenue and Taxation Code §§ 18817. It provides in pertinent part:

“(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section.”

It is clear that *identical* requirements are imposed upon *all* employers under California Revenue and Taxation Code §§ 18817-18818. No distinction is made between the United States and other employers. Thus, the first part of 5 U.S.C. § 5517(b) is not violated. Cf. *Clincher v. United States, States of Montana & Arizona* (Ct. Cl., 1974) 499 F.2d 1250, 1253-4, cert. denied (1975) 420 U.S. 991.

The second phrase in 5 U.S.C. § 5517(b) (“or which subjects the United States or its employees to a penalty or liability *because of this section*”) (Emphasis added) is also not in conflict with §§ 18817-18818 because of the proviso “*because of this section*” included therein. The Board is *not* suing for violation of the agreement set forth in 5 U.S.C. § 5517. It is suing for violation of § 18817 under the authority of § 18818. No penalty or liability because of 5 U.S.C. § 5517 is being sought. Accordingly, no conflict between state and federal statutes clearly exists in this matter and none should be sought out. *Seagram & Sons, Inc. v. Hostetter, supra*, 384 U.S. 35, 45 reh. denied (1966) 384 U.S. 967. Moreover, there is absolutely no physical impossibility of being able to comply with both the federal and state statutes. *Florida Growers v. Paul, supra*, 373 U.S. 132, 142-3. Finally, as Congress enacted 5 U.S.C. § 5517 in order to *cooperate* with state tax collection it cannot seriously be contended that § 18817 stands as an obstacle to the accomplishment and execution of these cooperative purposes and objectives of Congress. See 2 U.S. Code Congressional & Administrative News pp. 2360-1,

2433-4; *Hines v. Davidowitz, supra*, 312 U.S. 52, 67.

A further indication of the absence of any real conflict can be perhaps best found in the oral argument at the District Court level of counsel for the Postal Service wherein he stated that if the Board took the additional step and obtained a *judicial garnishment*, all obnoxious elements in the Board's tax collection procedures would be eliminated. (Appendix F, *infra*.) This elimination of the alleged conflict would occur because there would be less likelihood of the *volume* of judicial tax garnishments as opposed to administrative tax garnishments. (Appendix F, *infra*.) To find that an actual conflict between statutes exists at the *whim* of the Postal Service is plainly in error.

III.

THE POSTAL SERVICE IS NOT IMMUNE FROM THE FRANCHISE TAX BOARD'S TAX COLLECTION PROCEDURES.

Due to the Postal Reorganization Act of 1970, Federal Courts of Appeal in *seven* of the Circuits have expressly held that the Postal Service is not immune from state garnishment or other related proceedings. *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954, 960; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1149; *Goodman's Furniture v. United States Postal Service* (3rd Cir. 1977) 561 F.2d 462, 465; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292; *Beneficial Finance Co. Of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-128; *Assoc. Financial Services of America v. Robinson* (5th Cir. 1978) 582 F.2d 1. In addition, the United States Court of Claims has agreed with these decisions and has held that section 401 of the Postal Reorganization Act (39 U.S.C. § 401) waives the Postal Service's immunity from suit. *Coley Properties Corp. v. United States* (Ct. Cl. 1979) 593 F.2d 380, 387. The Ninth Circuit has also stated in dicta in a recent decision that section 401 above may now permit suits against the Postal Service that were prohibited against its predecessor, such as garnishment proceedings. *Sportique Fashions, Inc. v. Sullivan* (9th Cir. 1979) 597 F.2d 664, 665-666, fn. 2. As far as the Board is aware, no Circuit before this decision of the Ninth Circuit has

ever held that the Postal Service is immune from state garnishment and other related proceedings.

In the instant case, the Postal Service has put forth many sovereign immunity contentions identical to those put forth previously by the Postal Service which have been uniformly rejected by every Federal Court of Appeal which has considered the issue. Although the Postal Service contended at trial that it was not relitigating the "sue and be sued" clause of 39 U.S.C. § 401(1), every single argument espoused by it was nothing more than an indirect attempt to relitigate the question whether Congress really waived the sovereign immunity of the Postal Service when it enacted Public Law 91-375 in 1970.

The above cited Postal Service garnishment cases should dispose of the instant action favorably to the Board due to the fact that the primary difference between the above cited cases and the instant one is that no state court judgment has been obtained by the Board. However, unlike other civil actions, summary collection procedures to collect delinquent *taxes* are constitutionally permissible. No "judgment" of any kind is necessary. *Phillips v. Commissioner* (1931) 283 U.S. 589, 596-7; *Bull v. United States* (1935) 295 U.S. 247, 260; *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 352 fn. 18; *Scottish Union & Nat. Ins. Co. v. Bowland* (1905) 196 U.S. 611, 632; *Bomher v. Reagan*, *supra* (9th Cir. 1975) 522 F.2d 1201, 1202. The Board has the status of a judgment creditor and is entitled to all of the remedies associated therewith. California Code of Civil Procedure § 688.020(a); see also, *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382; *Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board of State of California* (9th Cir. 1965) 348 F.2d 9, 10-11; *C.I.T. Corporation v. United States* (N.D. Calif., 1972) 344 F.Supp. 1272, 1276; *United States v. Fisher* (N.D. Calif., 1948) 93 F.Supp. 73, 75-76.

Therefore, as other judgment creditors would be permitted to sue the Postal Service for failure to honor garnishment requests under 39 U.S.C. § 409(a), the Board should likewise be permitted to do so in these actions.

It must be recognized that the waiver of immunity provided for in 39 U.S.C. § 401(1) is not limited. There was no qualifi-

cation upon the Postal Service's amenability to process in the statute. The phrase "sue and be sued" *embraces all civil legal proceedings.* *General Elec. Credit Corp. v. Smith, supra,* 565 F.2d 291, 292.

This Court's holdings in the trilogy of cases, *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *F.H.A. v. Burr* (1940) 309 U.S. 242 and *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81 are controlling. In those cases, this court stated:

"[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Keifer & Keifer v. R.F.C., supra*, 306 U.S. 381; 388.

"[I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued', that agency is not less amenable to judicial process than private enterprise under like circumstances would be." *F.H.A. v. Burr, supra*, 309 U.S. 242, 245.

"[T]he words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings." *R.F.C. v. Menihan Corp., supra*, 312 U.S. 81, 85.

If a private employer or enterprise acts in violation of California Revenue and Taxation Code §§ 18817-18819, the Board could institute legal action against that private employer or enterprise to recover the amounts not transmitted to the Board. As the Postal Service was "launched into the commercial world," under the Postal Reorganization Act (see *Standard Oil, supra*, 528 F.2d 201, 204; *Goodman's, supra*, 561 F.2d 462, 464-465. *May Dept. Stores, supra*, 549 F.2d 1147, 1148; *Beneficial Finance, supra*, 571 F.2d 125, 127-128), there is clearly no basis in law or policy for blocking the instant action wherein the Postal Service has acted in violation of the above sections. The Postal Service is simply not immune from the Board's tax collection procedures. Furthermore, to sustain the Postal Service's position in these cases would be contrary to the prohibitions of 28 U.S.C. § 1341 which provides that no District Court shall enjoin the assessment, levy or collection of a tax.

IV.

THE BOARD MAY INSTITUTE TAX COLLECTION PROCEEDINGS WITHOUT OBTAINING A STATE COURT JUDGMENT PRIOR THERETO.

At the oral argument of the cross motions in the instant matter, it was stated by counsel for the Postal Service that had the Board obtained a technical state court "judgment" and levied on that "judgment," the Postal Service would have honored that levy. (Appendix F, *infra*.) However, counsel for the Postal Service contended that administrative levies or garnishments such as the Board's Orders to Withhold would not be and are not being honored because the Postal Service believes there is no determination of liability in these instances. (Appendix F, *infra*.) The Postal Service's statements are completely erroneous and fly directly in the face of long-standing and well established authority upholding the validity and constitutionality of summary tax collection procedures.

As shown in argument III above, summary administrative proceedings to collect taxes have been consistently upheld by this Court. *Phillips v. Commissioner*, *supra*, 283 U.S. 589, 596-7; *Bull v. United States*, *supra*, 295 U.S. 247, 260; *Scottish Union & Nat'l. Ins. Co. v. Bowland*, *supra*, 196 U.S. 611, 632; *G.M. Leasing Corp. v. United States*, *supra*, 429 U.S. 338, 352 fn. 18. A tax assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. *Bull v. United States*, *supra*, 295 U.S. 247, 260; quoted with approval in *G.M. Leasing Corp. v. United States*, *supra*, 429 U.S. 338, 352, fn. 18. The underlying rationale for approval of the summary procedures is that the very existence of government depends upon the prompt collection of the revenues. *Ibid.* As long as there is an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute authorizing summary collection procedures meets the requirements of due process. *Phillips v. Commissioner*, *supra*, 283 U.S. 589, 596-597. A suit for refund is an adequate alternative means of subsequent judicial review. *Id.*, at 597-598.

The Board's tax collection procedures conform to the standards set forth above by this Court. In this case, collection of delinquent

taxes is permitted without obtaining a state court judgment prior thereto. The taxpayer has available to him or her subsequent judicial review in the form of the suit for refund procedure. California Revenue and Taxation Code §§ 19081-19092.

A. The Board's Procedures.

In this matter, each of the four tax debtors filed personal income tax returns self-assessing himself a specific tax liability which was not paid with the returns. California Revenue and Taxation Code § 18551 requires, for a calendar year taxpayer, the personal income tax to be paid by April 15 following the close of the calendar year for which the tax is owed. If not paid by the April 15 date, the liability immediately becomes due and payable on the day after such payment due date and collection procedures may immediately commence. (Revenue and Taxation Code § 18881(a).³

The Board has several alternative methods by which it may effect collection. The methods are *cumulative* and may be used in combination with or separate from each other. (Rev. & Tax. Code § 18931.) As in the instant case, an order to withhold may be issued. (Rev. & Tax. Code §§ 18817-18819.) A civil suit for tax may be brought. (Rev. & Tax. Code § 18831.) A certificate constituting a judgment may be filed (Rev. & Tax. Code §§ 18861-18863) and the Board may execute upon said judgment. (Rev. & Tax. Code § 18865.) In addition, when the tax is not paid timely, a perfected and enforceable state tax lien upon all of the taxpayer's property within California in the amount of the self-assessment arises upon which the Board may levy for purposes of collection. (Rev. & Tax. Code § 18881.) Finally, a warrant may be issued for the collection of the tax liability (Rev. & Tax. Code § 18906), which has the same force and effect as a writ of execution, and is to be levied in the same manner and with the same force and effect as a levy of a writ of execution. (Rev. & Tax. Code § 18907.)

³See *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, where the Ninth Circuit upheld the Board's summary collection procedures with respect to a similar self-assessed liability.

Furthermore, the Board shall be entitled to all of the remedies of a judgment creditor. (California Code of Civil Procedure § 688.020(a).

An Order To Withhold (Rev. & Tax. Code § 18817) has the same force and effect as a warrant for collection, except that there are no exemptions from the Order-to-Withhold process. *Greene v. Franchise Tax Bd.* (1972) 27 Cal.App.3d 38, 41-45. The Order-to-Withhold procedure is like post-judgment execution. *Randall v. Franchise Tax Board*, *supra*, 453 F.2d 381, 382. As stated, the summary tax collection procedures employed by the Board have been held to be constitutional by the Ninth Circuit. *Ibid. Bomher v. Reagan*, *supra*, 522 F.2d 1201, 1202; *Kelly v. Springett*, *supra*, 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board*, *supra*, 348 F.2d 9, 10-11. The argument that a tax debt must be supported by a court judgment before payment of the debt may be required was expressly rejected in *Bomher v. Reagan*, *supra*, 522 F.2d at 1201-1202.

Any employer failing to withhold the amount due from any taxpayer and failing to transmit the same to the Board after service of an Order-to-Withhold is liable to the Board for such amount. (Rev. & Tax Code § 18818.) The Postal Service which admittedly was the employer of three of the four tax debtors in question was required by Revenue and Taxation Code § 18818 to withhold and transmit the amounts owed to the tax debtors to the Board. *People v. Freeny* (1974) 37 Cal.App.3d 20, 31. Any employer required to withhold and transmit any amount is to do so without resort to any court action. (Rev. & Tax. Code § 18819.) Accordingly, the law compelled the Postal Service to deliver the funds in question to the Board. *Kanarek v. Davidson* (1978) 85 Cal.App.3d 341, 346. As the Postal Service failed to comply with the law, it is liable to the Board for the amounts it should have withheld and transmitted thereto.

V.

**UNDER THE BUCK ACT THE BOARD HAS THE POWER TO
LEVY AND COLLECT PERSONAL INCOME TAX FROM
POSTAL SERVICE EMPLOYEES.**

In 1939, this Court held that the salaries of employees or officials of the federal government or its instrumentalities were not immune from taxation by the states. *Graves v. N.Y. ex rel.*

O'Keefe (1939) 306 U.S. 466, 480-7; *State Tax Comm'n v. Van Cott* (1939) 306 U.S. 511, 515.

In the same year as the *Graves* decision, Congress passed the Public Salary Act of 1939 (4 U.S.C. § 111, formerly 5 U.S.C. § 84a), expressly consenting to state taxation of pay or compensation for personal service of federal employees.

In 1940, Congress enacted the Buck Act (4 U.S.C. §§ 105-110) which gave consent to the levy and collection of various taxes from federal employees in federal areas. Section 106 of the Buck Act authorizes the levy and collection of state income taxes from federal employees.

It is important to note that 4 U.S.C. § 106(a) speaks in terms of the State having full jurisdiction and power to levy and collect income taxes within a "federal area" just as if it were not a federal area, *Howard v. Commissioners* (1953) 344 U.S. 624, 628-9.

The term "federal area" is defined in section 110(e) of the Buck Act and has been recently held by the Supreme Court of Colorado to include the branch offices of the Postal Service as well as the main post offices. *Rountree v. City and County of Denver* (Colorado, 1979) 596 P.2d 739, 740-1. As a result, the City and County of Denver was permitted to levy and collect from eight Postal Service employees an occupation tax regardless of the working location of the employees. *Id.*

Unquestionably, in order to give the Buck Act any meaning, the taxing authority must have the power to enforce the levying and collection of its tax both within and without federal areas. Such a result has been reached in *City of Philadelphia v. Konopacki* (Pen., 1976) 366 A.2d 608, 610.

Furthermore, it is the long established policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. *Non-Resident Taxpayers Ass'n. v. Municipality of Phila.* (3rd Cir. 1973) 478 F.2d 456, 459.

CONCLUSION.

For the above stated reasons, the Franchise Tax Board respectfully submits that this Court should note probable jurisdiction to:

1. Clarify the status of the Postal Service under the Postal Reorganization Act and find that it has been launched into the commercial world and accordingly should be required to honor the Order to Withhold of the Franchise Tax Board.
2. Settle the diversity of opinion presently existing between seven separate Circuit Courts of Appeal and the Ninth Circuit with regard to the garnishment of Postal Service employees' wages.

Respectfully submitted,

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APPENDIX A.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.
Employment Development Department, Plaintiff-Appellant,
vs. United States Postal Service, Defendant-Appellee.
No. 80-5694. D.C. # CV-78-4014-HP.

Franchise Tax Board, Plaintiff-Appellant, vs. United
States Postal Service, Defendant-Appellee. No. 80-5700.
D.C. # CV-78-4746-HP.

Filed: February 10, 1983.

Appeal from the United States District Court for the Central
District of California.

Harry Pregerson, District Judge, Presiding. Argued and submitted December 8, 1981.

Before: SCHROEDER AND REINHARDT, Circuit Judges,
and THOMPSON,* District Judge.

PER CURIAM:

At issue is whether California state agencies may use California summary tax collection procedures to reach funds in the hands of the United States Postal Service. The district court consolidated these two cases involving similar facts and legal questions but different statutes, and granted summary judgment for the Postal Service. In both cases, California state taxing authorities sought to utilize administrative collection procedures resembling garnishment in order to collect sums owed by the Postal Service to delinquent taxpayers.

Plaintiff in the first case is the Employment Development Department, seeking to recover unemployment insurance taxes owed to the state by contractors who have done work for the Postal Service. Plaintiff in the second case is the Franchise Tax Board, seeking to collect personal income

*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

taxes owed by Postal Service employees. Because the applicable statutes and resulting analysis differ, we discuss each case separately.

1. *The Employment Development Department*

In February 1978, the Employment Development Department (the Department) issued two "notices of levy" pursuant to § 1755¹ of the California Unemployment Insurance Code, notifying the Postal Service that two of its mail transportation contractors were delinquent in paying taxes to the Department. The notices purported to constitute a levy on monies owed to those tax debtors by the Postal Service. The Postal Service refused to comply, stating that it was not authorized to make the payment requested. In October 1978, the Department filed this action seeking judgment in the amount of the tax delinquencies, and court costs.

The district court granted summary judgment for the Postal Service, holding Cal. Unemp. Ins. Code § 1755 inapplicable to the Postal Service because that statute does not expressly include within its reach the United States and its agencies or instrumentalities. In the alternative, the district

¹Cal. Unemp. Ins. Code § 1755 provides:

If any person or employing unit is delinquent in the payment of any contributions, penalties or interest provided for in this division, the director may . . . collect the delinquency or enforce any liens by levy served either personally or by certified mail, to all persons having in their possession or under their control any credits . . . belonging to the delinquent person or employing unit, or owing any debts to such person or employing unit at the time of the receipt of the notice of levy. Any person upon whom a levy has been served having in his possession or under his control any credits . . . belonging to the delinquent person or employing unit or owing any debts to such person or employing unit at the time of the receipt of the levy, shall surrender such credits . . . to the director or pay to the director the amount of any debt owing the delinquent employer within five days of service of the levy. Any such person in possession of any credits . . . or owing any debts to the delinquent person or employing unit who surrenders such credits . . . or pays such debts owing the delinquent person or employing unit shall be discharged from any obligation or liability to the delinquent person or employing unit with respect to the credits . . . surrendered or debts paid to the director. . . .

court found the Department's claim barred by 39 U.S.C. § 5006, on the theory that that section is the exclusive statutory authority for reaching funds in the hands of the Postal Service owed to its contractors, and that the Department is not one of those authorized to proceed under that section.

We consider first whether Cal. Unemp. Ins. Code § 1755 authorizes the Department to proceed by administrative levy against the Postal Service. If it does, we must also consider whether such levies are nevertheless prohibited by applicable federal law.

The Postal service contends that state law does not authorize use of the levy procedures against an agency of the United States because such agencies are not expressly made subject to levy by the statute. The Postal Service does not contend that it is immune from all suits, for § 401(1) of the Postal Reorganization Act² clearly and unambiguously waives sovereign immunity by providing that the Service "may sue and be sued." *See generally FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940). Rather, the Service argues that the state statute is by its own terms inapplicable.

The statute provides that the Director may serve the notices of levy on "all persons" having under their control any assets of the tax debtor. Section 1757 states that "any person" failing to turn over such credits shall be liable to the Department in the amount owed to the tax debtor, but not exceeding the amount specified in the notice of levy.

While these two sections appear to be quite broad in scope, the current problem arises from the fact that section 1758 states only that "[a]s used in this article 'person' includes this State and any county, city and county, municipality, district or other political subdivision thereof." The Service argues that, in referring to state and local gov-

²Act of Aug. 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, codified at 39 U.S.C. §§ 101 *et seq.*

ernmental entities but omitting any reference to their federal counterparts, the state legislature exempted federal agencies from the statute.³

A specific reference to state governmental entities is necessary if the legislature intends to waive the immunity to which those entities would otherwise be entitled under state law. Cal. Const. art. 20, § 6; *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505, 512 (1942); *Galbes v. Girard*, 46 F. 500, 501 (C.C.S.D. Cal. 1891). Cf. *Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (per curiam) (waiver of state's eleventh amendment immunity found only by express language or such overwhelming implication from text that no other construction reasonable); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (same). But reference to federal entities in a state statute would serve no similar purpose since an act of Congress, not of a state legislature, is necessary to effect a waiver of federal immunity. *Army & Air Force Exchange Service v. Sheehan*, ____ U.S. ___, 102 S.Ct. 2118 (1982); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969).

The Service argues that the term "person" when used in a state statute can never, as a matter of statutory interpretation, include federal entities, but it offers no persuasive authority for such a rule. It relies upon *United States v. United Mine Workers*, 330 U.S. 258, 272, 67 S.Ct. 677, 686 (1947), which stated that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." The court there held that Congress did not intend to treat the United States in the same manner as other "em-

³The definition of "person" in § 1758 does not expressly refer to those types of entities commonly subject to the withholding requirements of state unemployment insurance taxes, i.e., corporations, partnerships and associations, but the Postal Service does not suggest that those entities are exempt by virtue of the omission.

ployers" under federal labor laws. *Id.* at 276, 67 S.Ct. at 687. *United Mine Workers* establishes no general rule of construction applicable here. Interpretation of the California statute involves construction of state law, not the scope of federal sovereign immunity.⁴ The Postal Service offers neither a reason why California should wish to treat federal agencies any differently than it treats other employers for purposes of state tax collection procedures, nor any indication that the state legislature intended to do so.

Our conclusion that state law authorizes the Department to direct notices of levy under § 1755 to the Postal Service is reinforced by a rule of construction used by the California courts. In construing Cal. Civ. Proc. Code § 17, which parallels section 1758 in stating that the term "'person' includes" listed types of entities, the California court of appeal articulated the California rule:

The statement that the word person "includes" a natural person and a corporation leaves open for consideration what other types of entities that word includes when used in a particular context to meet a given situation. The word "includes" is not ordinarily a word of limitation but rather of enlargement.

Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512, 230 P.2d 71, 105-06 (1951). *Accord*, *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 268 P.2d 723, 733 (1954); *Patricia J. v. Rio Linda Union School District*, 61 Cal.App.3d 278, 132 Cal.Rptr. 211, 216 (1976); *Datil v. City of Los Angeles*, 263 Cal.App.2d 655, 69 Cal.Rptr. 788, 790 (1968); *Durkin v. Durkin*, 133

⁴Nor is it clear that Cal. Unemp. Ins. Code § 1755 operates to "divest pre-existing rights" within the meaning of *United Mine Workers*. Traditionally, labor injunctions had been available to employers under certain circumstances; the Norris-LaGuardia Act, however, divested federal courts of jurisdiction to issue such injunctions. 29 U.S.C. § 101. The relevant sections of the California Unemployment Insurance Code do not appear to "divest" the Postal Service of any "rights or privileges" in the sense the Supreme Court used those terms, since they do not take away remedies previously available.

Cal.App.2d 283, 284 P.2d 185, 188-89 (1955). We therefore conclude that the Postal Service is a "person" against whom the Department may proceed under § 1755.⁵

The Service's alternative contention is that even if the California statute is construed to apply to the Postal Service, the statute is inconsistent with and therefore preempted by 39 U.S.C. § 5006.⁶ That statute by its terms governs the creation of liens in favor of those who perform services for a Postal Service contractor or subcontractor. The parties agree that the Department cannot become a lienor within the meaning of the statute, since it has not performed services for a Postal Service contractor or subcontractor. The Service goes on to argue, however, that because § 5006 is the only statutory authority expressly conferring a right to proceed against the Service in order to reach funds owed to a postal contractor or subcontractor, the Department may not levy upon such funds in any other fashion.

The Service cites no cases in support of its position, and several courts have effectively established that § 5006 is not the exclusive means of attaching Postal Service funds

⁵Cf. *Georgia v. Evans*, 316 U.S. 159, 162 (1942) ("any person," as used in § 7 of Sherman Act, 15 U.S.C. § 15, includes states); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) ("any person," as used in § 8 of Sherman Act, 15 U.S.C. § 8, includes municipalities). *Accord, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 395-97 & nn.10, 14 (1978).

That section provides only that:

(a) A person who—

(1) performs service for a contractor or subcontractor in the transportation of mail;
(2) files his contract for service with the Postal Service; and
(3) files satisfactory evidence of performance with the Postal Service;

shall have a lien on money due the contractor or subcontractor for the service

(b) The Postal Service may pay the person establishing a lien under subsection (a) of this section the sum due him, when the contractor or subcontractor fails to pay the person the amount of his lien within 2 months after the expiration of the month in which the service was performed. It shall charge the amount so paid to the contract. The payments may not exceed the annual rate of pay of the contractor or subcontractor.

owed to contractors or subcontractors. In *Kennedy Electric Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974), a subcontractor was allowed to recover from the Postal Service money owed to the general contractor by the Service. The court did not mention § 5006; recovery was permitted because the subcontractor had established an equitable lien, not a statutory one. Moreover, the Service's argument is inconsistent with other decisions allowing garnishment of Postal Service funds without regard to whether the debt garnished is owed to a contractor or subcontractor. *General Electric Credit Corp. v. Smith*, 565 F.2d 291 (4th Cir. 1977) (per curiam); *May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975) (per curiam).

Accordingly, we hold that 39 U.S.C. § 5006 does not bar the collection procedures utilized here. The summary judgment granted against the Employment Development Department and in favor of the United States Postal Service is reversed.

II. *The Franchise Tax Board*

In Mid-1978, the Franchise Tax Board (the Board) issued four "orders to withhold" to the Postal Service under Cal. Rev. & Tax. Code § 18817.⁷ These orders informed the Postal Service that four individual employees were delin-

⁷Cal. Rev. & Tax. Code § 18817 provides:

The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the state, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer or the amount of any liability incurred by such employer or person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate.

quent in paying state income taxes. The orders purported to constitute a levy on the credits or payments owed by the Postal Service to the four Taxpayer-employees. The Postal Service refused to comply, arguing as it had with the Department that the statute authorizing such orders was not applicable to federal agencies such as the Postal Service. The Board commenced this action in December 1978, seeking judgment in the amount of the tax delinquencies and court costs.

The district court held in granting summary judgment for the Postal Service that, first, state law does not authorize such levies against federal agencies, and second, the Postal Service cannot be required to collect delinquent California tax liabilities of its employees because a contrary conclusion would violate 5 U.S.C. § 5517, which governs the withholding of state income taxes by federal agencies.

The Postal Service's first argument, that the California Revenue and Taxation Code does not authorize use of the summary tax collection procedures against a federal agency, is frivolous in view of the express provisions of those statutes. Here, unlike the situation in the companion case involving the Employment Development Department, the California legislature has unequivocally demonstrated its intention. It is true that neither the Postal Service in particular, nor federal agencies in general, are expressly included within the definition of "employer" embodied in section 18810.⁸ That definition, however, must be read together

⁸Cal. Rev. & Tax. Code § 18810(a) has been repealed and recodified at Cal. Unemp. Ins. Code § 13005. At the time relevant to this lawsuit, § 18810(a) provided:

For purposes of this chapter, the term "employer" means any individual, person, corporation, association or partnership, or any agent thereof, doing business in this state, deriving income from sources within the state, or in any manner whatsoever subject to the laws of this state, the State of California or any political subdivision or agency thereof, including the Regents of the University of California, any city organized under a freeholders' charter, or any political body not a subdivision or agency of the state, and any person, officer, employee, department, or agency

with the definition of "employee" in section 18809, repealed in 1980 and recodified at Cal. Unemp. Ins. Code § 13004. An employee is "[any] individual who receives remuneration for services performed within this state and includes an officer, employee, or elected official of the United States . . . or any agency or instrumentality [thereof]." Thus, reading the two sections together, it is obvious that the Postal Service is an "employer" indebted to an "employee" within the meaning of those sections.⁹ State law clearly authorizes issuance of notices to withhold to the Postal Service.

It remains to be considered only whether the Service is nevertheless excused from compliance by federal law. Under 5 U.S.C. § 5517,¹⁰ the Secretary of the Treasury is

thereof, making payment of wages to employees for services performed within this state. . . .

It is not contended that in order to be operative the statute must refer specifically to the Postal Service; the Service does argue that applicability to federal agencies in general will not be implied, in the absence of express language.

"This conclusion is made express in a formal regulation promulgated by the Board. Cal. Admin. Code, tit. 18 regulation 18810. Subsection (a) of that regulation states that: "[t]he term 'employer' means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." Subsection (d) further states that "[t]he term 'employer' embraces not only individuals and organizations engaged in trade or business, but . . . the governments of the United States, the states, territories, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions."

⁹5 U.S.D. § 5517 provides:

(a) When a State statute—

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State

required to enter into contracts with states wishing federal agencies and instrumentalities to withhold state income taxes from payments to employees liable therefor. Subsection (b) and the parallel provision of the contract between the Secretary and California prohibit the imposition of "a penalty or liability because of this section" on "the United States or its employees."¹¹

The Service argues that the provisions of § 5517 prohibit these levies. We agree. This section, the substance of which has been in effect since 1952, was enacted for the specific purpose of providing for the withholding of state income taxes from the earnings of federal employees. On November 6, 1952, the state of California entered into an agreement as contemplated by § 5517. The agreement specifically states: "3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of federal employees." The standard agreement prescribed by regulation, 31 C.F.R. 215.12(a) (1978) contains the same provision. The regulations promulgated by the Secretary of the Treasury to implement § 5517 are specifically applicable to the United States Postal Service. 31 C.F.R. § 215.2(a). Before the enactment of the Postal Reorganization Act (Footnote 2), the Post Office Department employees in California were subjected to withholding of state income taxes in accordance with § 5517 and the agreement.

withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. . . .

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

¹¹See n. 10, *supra*. See generally 31 C.F.R. §§ 215.1 — 215.13.

The Congress included 39 U.S.C. § 410 in the Postal Reorganization Act. It provides, in part: "Except as provided in subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts . . . employees . . . or funds . . . apply to the exercise of the powers of the Postal Service." Subsection (b) does not include § 5517 (withholding of state income taxes) but does include § 5520 (withholding of city income and employment taxes). Section 5520 was first enacted on July 10, 1974, 88 Stat. 294, and 39 U.S.C. § 410 was amended by the same law to include this new provision for withholding city income and employment taxes as a law applicable to the Postal Service.

When the Postal Reorganization Act was adopted, the Congress was faced with the situation of transforming an established federal agency, the Post Office Department, into the United States Postal Service, "an independent establishment of the executive branch." The transition was accomplished with as little disruption as possible. In substance, all previous laws, regulations and contracts remained in effect until changed by the Board of Governors of the new independent establishment. 62 Am.Jur.2d, § 2, p.6.¹² It is true that the language of 39 U.S.C. § 410, "insofar as such laws remain in force as rules or regulations of the

¹²62 Am.Jur., § 2, p. 6.

In enacting the Postal Reorganization Act, Congress provided that all orders, determinations, rules, regulations, permits contracts, certificates, licenses, and privileges which remained effective at the time the Postal Service commenced operating were to continue in effect until modified, terminated, superseded, set aside, or repealed by the Service in the exercise of its administrative authority. Moreover, Congress provided that all provisions of Title 39 of the United States Code in effect immediately prior to the effective date of such act are to continue in force as rules or regulations of the Postal Service, to the extent that the Service is authorized to adopt such provisions as rules or regulations until they are revoked, amended, or revised by the Postal Service.

Postal Service," may be somewhat equivocal in support of this conclusion, but the Savings Provision of Public Law 91-375 (84 Stat. at 774-5) is much more specific.¹³

The undisputed evidence shows that the United States Postal Service did recognize that the withholding of state income taxes contract does apply to it and continues in force and effect. When in 1974 a new act was passed authorizing similar agreements for the withholding of city or county income or employment taxes, the fact that this law was made specifically applicable to the United States Postal Service implies Congressional recognition that the statute pertaining to the withholding of state income taxes was already applicable to it. The anomaly inherent in any other conclusion is obvious.

The orders to withhold served by the Franchise Tax Board were issued pursuant to Cal. Rev. & T. Code § 18817 (Footnote 7), which is part of Chapter 19, Article I of the

¹³Savings Provision of Public Law 91-375 (84 St. at 774-5).

Sec. 5.(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges —

(1) which have been issued, made, granted, or allowed to become effective

(A) under any provision of law amended by this Act; or

(B) in the exercise of duties, powers, or functions which are transferred under this Act;

by (i) any department or agency, any functions of which are transferred by this Act, or (ii) any court of competent jurisdiction; and

(2) which are in effect at the time the United States Postal Service commences operations, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Postal Service (in the exercise of any authority vested in it by this Act), by any court of competent jurisdiction, or by operation of law.

* * *

(f) Provisions of title 39, United States Code, in effect immediately prior to the effective date of this section, but not re-enacted by this Act, shall remain in force as rules or regulations of the Postal Service established by this Act, to the extent the Postal Service is authorized to adopt such provisions as rules or regulations, until they are revoked, amended, or revised by the Postal Service.

Revenue and Taxation Code relating to "Information and Withholding Tax at Source." It deals with the same subject matter as 5 U.S.C. § 5517. In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated income tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The Franchise Tax Board argues with considerable persuasiveness that the United States Postal Service is now a quasi-autonomous entity. The Postal Service has been "launched into the commercial world." *See FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940); *May Department Stores Co. v. Williamson*, 549 F.2d 1147, 1148 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201, 202-3 (7th Cir. 1975). The Postal Reorganization Act, 39 U.S.C. § 401(1), with two narrow limitations not relevant here, expressly confers on the Postal Service the general power to sue and be sued in its official name. So, it is contended that this general waiver of immunity overrides the specific limitations and restrictions of 5 U.S.C. § 5517 and the pertinent agreements and regulations. We do not agree. The general rule of statutory construction is that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 2483 (1974). *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151, 96 S.Ct. 1989, 1992-3 (1976).¹⁴

¹⁴*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151.

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417

(footnote continued on following page)

The summary judgment granted against the Franchise Tax Board and in favor of the United States Postal Service is affirmed.

U.S. 535, 550-551, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301.
"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874).

Employment Development Department v. United States Postal Service, No. 80-5694 and *Franchise Tax Board v. United States Postal Service*, No. 80-5700.

SCHROEDER, Circuit Judge, Dissenting in part:

I concur in the court's opinion in No. 80-5694 holding that the California Employment Development Department may recover funds which the U.S. Postal Service owes to mail transportation contractors who are delinquent in paying state unemployment taxes.

I dissent from the decision in No. 80-5700 which holds that the California Franchise Tax Board may not use similar procedures to recover funds which the Service owes to employees who are delinquent in paying state income taxes. The majority reaches that determination because it interprets 5 U.S.C. § 5517 to prohibit use of such procedures. I cannot agree.

Section 5517 authorizes federal agencies to withhold state income taxes from their employees' salaries. By its own terms, it is a limited waiver of sovereign immunity. It therefore provides in part that

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. 5 U.S.C. § 5517(b) (1976).

The language is merely a description of the limited congressional consent given in that provision. It does not purport to limit congressional power to waive immunity in other statutes.

In the Postal Reorganization Act, Congress did waive Postal Service immunity, without any qualification regarding state tax procedures, by providing that the Service can "sue or be sued" like a private employer. 39 U.S.C. § 401(1) (1976). *See FHA v. Burr*, 309 U.S. 242, 245, 60 S. Ct. 488, 490 (1940). The federal courts have consistently held

that section 401(1) waives Postal Service immunity from state garnishment proceedings. *Associates Financial Services v. Robinson*, 582 F.2d 1 (5th Cir. 1978) (per curiam); *Beneficial Finance Co. v. Dallas*, 571 F.2d 125 (2d Cir. 1978); *General Electric Credit Corp. v. Smith*, 565 F.2d 291 (4th Cir. 1977) (per curiam); *Goodman's Furniture Co. v. United States Postal Service*, 561 F.2d 462 (3d Cir. 1977) (per curiam); *May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975) (per curiam). See also *Sportique Fashions, Inc. v. Sullivan*, 597 F.2d 664, 665 n.2 (9th Cir. 1979) (dictum). Cf. *Snapp v. United States Postal Service*, 664 F.2d 1329 (5th Cir. 1982) (rejecting attempt by Postal Service employee to enjoin wage garnishment); *Long Island Trust Co. v. United States Postal Service*, 647 F.2d 336 (2d Cir. 1981) (assuming without discussion amenability of Postal Service to garnishment).

The statutory collection process in question here is essentially a garnishment procedure. We are offered no reason why Congress would wish to treat Postal Service employees' tax debts any differently than it treats their other debts. Nor are we offered any statutory language requiring such a distinction.

I conclude that California's income tax collection procedures do not offend the provisions of 5 U.S.C. § 5517, and that their implementation in this case is the only result which furthers Congress' intent to treat the Service like a private employer. I would therefore reverse both judgments.

APPENDIX B.

Judgment.

United States District Court, Central District of California.
Employment Development Department, Plaintiff, v.
United States Postal Service, Defendant. No. CV 78-4014-
HP (Px).

Franchise Tax Board, Plaintiff, v. United States Postal
Service, Defendant. No. CV 78-4746-HP (Px).

Filed: July 7, 1980.

This case having come on for hearing on defendant's Motion For Judgment On The Pleadings, Or, In The Alternative, For Summary Judgment on May 21, 1980, before the Honorable Harry Pregerson, the plaintiff being represented by its counsel George Deukmejian, Attorney General, California, and the defendant having been represented by its counsel, Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice, and the Court having considered all the pleadings, memoranda, and having heard the oral argument presented at time of hearing, and consistent with the Findings of Fact and Conclusions of Law on file herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of the defendant and against the plaintiffs dismissing these consolidated actions.

DATED: This 7th day of July, 1980.

/s/ Harry Pregerson
UNITED STATES CIRCUIT JUDGE
Sitting by designation

PRESENTED BY:

ALICE DANIEL
Assistant Attorney General

/s/ David Epstein
DAVID EPSTEIN

/s/ Gwynn T. Swinson
GWYNN T. SWINSON
/s/ Alfreda Robinson-Bennett
ALFREDA ROBINSON-BENNETT
Civil Division
Department of Justice

APPENDIX C.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.
Employment Development Department, Plaintiff, vs.
United States Postal Service, Defendant.
Franchise Tax Board, Plaintiff, vs. United States Postal
Service, Defendant.

Nos. CV 78-4014-HP, CV 78-4746-HP.

Filed: August 6, 1980.

Defendant's Motion for Summary Judgment came on for hearing before this court, plaintiff appearing through its counsel, George Deukmejian and Jeffrey M. Vesely, and defendant having appeared through its counsel, Alice Daniel, Assistant Attorney General, David Epstein, Gwynn T. Swinson, and Alfreda Robinson-Bennett, Attorneys, Civil Division, Department of Justice. The court having considered the pleadings, memoranda, exhibits, and all other documents herein, and having heard oral argument, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

In February 1978, the Employment Development Department (the Department) issued two Notices of Levy, pursuant to section 1755 of the California Unemployment Insurance Code, notifying defendant that two tax debtors, who allegedly held mail transportation contracts with defendant, were delinquent in paying taxes to the Department. (See Employment Development's Complaint, ¶¶5, 6, 12, 13). The notices purported to constitute a levy on the salary or accounts receivable paid or owed to these tax debtor mail contractors. (See Employment Development's Complaint, Exhibits A and C). By letters dated March 9 and 10, 1978, defendant declined to comply with the two notices on the

ground that it was not authorized to make the payments requested therein. (Employment Development's Complaint, Exhibits B and D).

II.

On October 18, 1978, the Department commenced this action against defendant seeking to recover damages for defendant's failure to deliver the personal property levied upon. The Department seeks court costs and a judgment against defendant up to the sum of \$896.20 for the amount of delinquent taxes owed by one mail transportation contractor. (See Employment Development's Complaint, p. 4). With respect to the second contractor, the Department seeks a judgment against defendant up to the sum of \$2,048.38. (See Employment Development's Complaint, p. 4).

III.

During July and August 1978, the Franchise Tax Board (the Board) issued four Orders to Withhold to defendant under section 18817 of the California Revenue and Taxation Code. (See the Board's Complaint, ¶¶8, 17, 26, 35). These orders stated that four individual residents of Los Angeles County, believed to be employed by defendant, were delinquent in paying state income taxes for certain specified years. (See the Board's Complaint, Exhibits C, F, J. M.). The orders purported to constitute a levy on the credits or payments paid or owed by defendant to the four taxpayer-employees. (Exhibits C, F, J. M.) By letters dated August 1, 23, and 29, 1978, defendants returned the orders stating that such orders are not applicable to federal agencies such as the Postal Service. (See the Board's Complaint, Exhibits D, G, K, N.)

IV.

The Board commenced this action against defendant on December 13, 1978, seeking to recover damages for failure to deliver personal property levied upon. The Board seeks court costs and judgments in the sums of \$1,577.16, \$952.21,

\$5,086.60 and \$729.45 for the amount of delinquent taxes owed by each employee, respectively. (See the Board's Complaint, p. 8).

V.

Pursuant to the authority granted by numerous provisions of the Postal Reorganization Act, 39 U.S.C. §101, *et seq.*, the Postal Service complies voluntarily with an agreement executed by the Secretary of the Treasury and the State of California on February 25, 1974; as amended by 39 C.F.R. §215 (1979), pursuant to 5 U.S.C. §5517. Section 5517 generally provides for federal agencies to withhold state income taxes from federal employees' paychecks in accordance with the withholding provisions of state income tax laws. (See Affidavit of James L. Healy, General Manager of the Payroll Requirements Division of the Finance Department of the United States Postal Service, hereafter referred to as the "Healy Affidavit," ¶2).

VI.

The Postal Service's withholding program is coextensive with the Secretary's February 25, 1974 agreement with the State as amended. (Healy Affidavit, ¶3). The Postal Service does not collect delinquent California tax liabilities of its employees since the agreement provides, *inter alia*, that nothing therein shall require collection by federal agencies of delinquent tax liabilities of federal employees. (Healy Affidavit, ¶3). The Postal Service's Financial Management Manual, which contains regulations prescribing permissible deductions from employees' pay, does not authorize deductions from employee pay pursuant to state administrative tax levies. (Healy Affidavit, ¶4).

CONCLUSIONS OF LAW

I.

Section 18818 is in direct conflict with the federal statute governing the withholding of state income taxes: section 18818 imposes liability on the employer for failing to collect

any tax payments due from the employee, while 5 U.S.C. §5517(b) precludes the imposition of liability or a penalty on the United States or its employees regarding the withholding of state income taxes. Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2), the California statute must yield to 5 U.S.C. §5517(b) since the state statute, as applied, is irreconcilably in conflict with federal law. *Paul v. United States*, 371 U.S. 245 (1963). In addition to the conflict between these statutes, the Postal Service is immune from state taxation or regulation, including the application of a statute which imposes liability for payment of the tax debts of postal employees. *Mayo v. United States*, 319 U.S. 441 (1943); *McCulloch v. Maryland*, 17 U.S. 316 (1819). Under an analogous principle derived from the Supremacy Clause, the Federal Government, and its agencies and instrumentalities, are immune from state control or regulation, unless Congress specifically provides otherwise. *Mayo v. United States*, *supra*. Application of the California statute would burden the Postal federal function by subjecting the Postal Service to a state law which contains more burdensome requirements than the employee tax withholding that federal law has authorized. Therefore, the Supremacy Clause prohibits application of the California statute in this case.

II.

The provisions of the contract executed between the Secretary of Treasury and the State of California pursuant to 5 U.S.C. §5517 are controlling in this action and preclude the imposition of liability on the defendant. The rights of parties to federal contracts, such as the section 5517 contract, are determined by the federal contract (as federal law) rather than by state law. The rationale for this rule is based on the Supremacy Clause and the necessity for uniform construction and application of such contracts throughout the United States. *United States v. Allegheny*, 322 U.S.

174, 183 (1943); *Clearfield Trust v. United States*, 318 U.S. 363, 366 (1942); *United States v. View Crest Gardens*, 268 F.2d 380 (9th Cir. 1959).

III.

The section 5517 contract authorizes withholding only and does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever. Moreover, the section 5517 contract expressly precludes liability on the part of federal officials. The State levy procedure would require the Postal Service, in contravention of the contract, to collect delinquent tax liabilities by remitting sums to plaintiff for the purpose of collecting State tax delinquencies. Moreover, the procedures imposed by State law would, contrary to the agreement, subject the Postal Service to liability for failing to remit sums levied upon.

IV.

The Employment Development Department's claim to funds allegedly owed by the Postal Service to mail transportation contractors is barred under 39 U.S.C. §5006. In the absence of any statutory authorization or contractual agreement permitting garnishment of funds owed to transportation contractors, the State is precluded from seeking to attach such funds. The provisions of 39 U.S.C. §5009 do not give states or agencies of states like Employment Development a private cause of action against the Postal Service. Moreover, the provisions of 39 U.S.C. §5006 which set forth the exclusive remedy for attachment of funds belonging to mail transportation contractors is inapplicable to plaintiff.

V.

The language of section 5006 demonstrates that the right of attachment under this provision extends only to persons who perform services for a contractor or subcontractor in

the transportation of mail. Accordingly, the Employment Development Department is not within the class of persons included in section 5006.

VI.

Both the Employment Development and Francise Tax Board complaints fail to state a claim upon which relief can be granted since the complaints allege a breach of duty and liability under state statutes which are inapplicable to the Postal service.

VII.

Section 1758 of the California Unemployment Insurance Code defines the term "person" as used in sections 1755 and 1757 as the State of California, any county, city, municipality, district or other political subdivision thereof. The United States and its agencies are expressly excluded from this definition. Moreover, there can be no inference that the United States or its agencies are included. Thus, California's provisions for service of Notices of Levy and the imposition of liability for failing to comply with such notices are inapplicable to the Postal Service as an agency of the United States. See, *National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers*, 414 U.S. 453 (1974).

VIII.

Sections 18817 and 18818 apply to "employers" and "persons." However, the code does not specifically define those terms to include the United States and its agencies. See section 18810. Therefore, under general principles of statutory construction, the United States and its agencies are excluded from those terms.

IX.

This court finds that the terms "employer" and "person" as defined in section 1758 of the Unemployment Insurance Code and section 18810 of the Revenue and Taxation Code do not refer to the Postal Service. The court further finds

that if these provisions, which mandate a duty to withhold and liability, had been intended to apply to the United States and its agencies, the statutes would have expressly so stated. Accordingly, the Postal Service has not breached any duty under these State statutes and is not liable to plaintiffs.

X.

Defendant is entitled to judgment as a matter of law.

XI.

Any of the foregoing conclusions of law deemed to be findings of fact are hereby incorporated into the findings of fact.

Dated: Aug. 6, 1980.

/s/ Harry Pregerson
HARRY PREGERSON
UNITED STATES CIRCUIT JUDGE
SITTING BY DESIGNATION.

APPENDIX D.

Order Amending Opinion and Denying Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

Employment Development Department, Plaintiff-Appellant, vs. United States Postal Service, Defendant-Appellee. No. 80-5694. D.C. No. CV-78-4014-HP (Central California).

Franchise Tax Board, Plaintiff-Appellant, vs. United States Postal Service, Defendant Appellee. No. 80-5700. D.C. No. CV-78-4746-HP (Central California).

Filed: June 3, 1983.

Before: SCHROEDER and REINHARDT, Circuit Judges,
and THOMPSON,* District Judge.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The opinion, dated February 10, 1983, is amended as follows:

Page 9, lines 7-9, strike the sentence: "On November 6, 1952, the state of California entered into an agreement as contemplated by § 5517" and substitute therefor the following: "The uncontested evidence in the record establishes that as early as 1962, withholding was provided by agreement pursuant to § 5517 between the Secretary of the Treasury and the State of California."

*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

APPENDIX E.

**Notice of Appeal to the Supreme Court of the
United States (Supreme Court Rule 10).**

United States Court of Appeals for the Ninth Circuit.
Employment Development Department, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee. No. 80-5694. DC No. CV-78-4014-HP.
Franchise Tax Board, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee, No. 80-5700. DC No. CV-78-4746-HP.

Filed: August 12, 1983.

NOTICE IS HEREBY given that the Franchise Tax Board of the State of California, the plaintiff-appellant above named, hereby appeals to the Supreme Court of the United States from the part of the final judgment ("opinion") of the United States Court of Appeals, Ninth Circuit, entered in this action on February 10, 1983, affirming the judgment of the United States District Court for the Central District of California entered July 9, 1980, in Case Number CV 78-4746-HP(Px) that California Revenue and Taxation Code § 18817 and/or § 18818 has been preempted as applied by 5 U.S.C. § 5517. Petition for Rehearing And Suggestion That Rehearing Be In Banc filed February 24, 1983, was denied by the Court of Appeals by "Order Amending Opinion And Denying Rehearing."

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: August 12, 1983.

JOHN K. VAN DE KAMP, Attorney General
of the State of California

EDMOND B. MAMER,

PATTI S. KITCHING,

Deputy Attorneys General

/s/ Patti S. Kitching

PATTI S. KITCHING

Attorneys for Franchise Tax Board

APPENDIX F.

Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Harry Pregerson, Judge Presiding.

Employment Development Department, Plaintiff and Appellant, vs. United States Postal Service, Defendant and Appellee. No. CV 78-4014-HP(Px). C.A. No. 80-5694.

Franchise Tax Board, Plaintiff and Appellant, vs. United States Postal Service, Defendant and Appellee. No. CV 78-4746-HP(Px). C.A. No. 80-5700.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, June 24, 1980

APPEARANCES:

On behalf of the Plaintiffs:

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Attorney General

EDMOND B. MAMER

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On behalf of the defendants:

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DAVID EPSTEIN
GWYNN T. SWINSON
ALFREDA ROBINSON-BENNETT
Civil Division
Department of Justice
Washington, D.C. 20530

LOS ANGELES, CALIFORNIA; TUESDAY, JUNE 24,
1980; 2:00 P.M.

THE COURT: Call the next item on the calendar.

THE CLERK: Item 1, CV 78-4014-HP and CV 78-
4746-HP, Employment Development Department v. U. S.
Postal Service, Franchise Tax Board v. U. S. Postal Service.

Counsel, announce your appearances.

MR. VESELY: Jeffrey M. Vesely, Deputy Attorney
General appearing for the plaintiffs.

MR. EPSTEIN: David Epstein, Department of Justice,
appearing for the defendants.

MR. GOTLIEB: Lawrence B. Gotlieb with the U. S.
Attorney's office for the defendants.

THE COURT: I have reviewed the various papers filed
in connection with these cross-motions.

Do you wish to be heard, Mr. Vesely?

MR. VESELY: Yes, your Honor.

THE COURT: Let's start out by having you explain
how you avoid — how the state would avoid the provisions
of Section 215.12 of 31 C.F.R., which provides:

“Nothing in this agreement shall be deemed to re-
quire collection by agencies of the United States of
delinquent tax liabilities of federal employees or mem-
bers of the armed forces.”

MR. VESELY: Your Honor, there are a couple grounds
that we would avoid that section.

First of all, that regulation, that section, was promulgated in —

THE COURT: Let me ask you this question: If the federal agency here was an agency other than the Postal Department — let's say the agency that we were involved with here was the United States Navy — would you be standing there today arguing that the Court ought to grant summary judgment in favor of the state agencies?

MR. VESELY: No, your Honor.

For one basic reason, and the reason is, the question of sovereign immunity would arise at that point, your Honor.

It is the state's position that because of the Postal Reorganization Act of 1970, and all of the cases that have interpreted the sue and be sued clause, which we have ~~repeatedly~~ referred to in our briefs, any sovereign immunity the Postal Service may have had, as the Post Office Department prior to the Postal Reorganization Act, has been waived.

With respect to the other federal agencies other than the Postal Service, which have not gone through a reorganization similar, it is the position of the state agencies that we would not be seeking to obtain funds through this order to withhold process, or notice of levy process.

THE COURT: The cases from other circuits that are cited — I'm looking particularly at Goodman's Furniture v. United States Postal Service, a Third Circuit case, all involved creditors other than state government, did they not?

MR. VESELY: Yes, they did, your Honor.

THE COURT: So would those cases be solid authority in support of your position?

MR. VESELY: I believe they would be, your Honor, because the simple fact is that in each of those cases judgment creditors were seeking, through state procedures, to garnish the wages of employees, in some of the cases; it's not clear in some of the others whether they were strictly employees of the Postal Service or whether they were perhaps independent contractors.

It's not clear from the facts in some of the cases. And I refer to that in my brief.

But the point of it is that these were judgment creditors.

The state taxing agencies are also judgment creditors, and which I also pointed out in my first brief.

With respect to taxes, the liabilities have become final in all cases. On the Franchise Tax Board side, the individuals filed returns showing a liability, self-assessing themselves and making no payment of the liability at that time.

THE COURT: But then don't you run smack into 215.12(a)?

MR. VESELY: The problem with this is, your Honor, if the agreement that is referred to in that section, as I pointed out in the brief again, in the supplemental brief, was the fact that the Postal Service was not a party to any agreement between the State of California and the federal government.

That regulation section covers not only Section 5517 of Title 5 of the United States Code, but it also covers Section 5520 of Title 5 of the United States Code.

5520 has a subsection (c)(4) that expressly refers to the Postal Service being within those agreements, and those agreements have to do with cities and counties with the federal government.

Now, expressly omitted from 5517 is any similar reference to the Postal Service.

The Postal Service was not a party to any agreement that preceded the enactment of 5517.

The Postal Service has even conceded this point and has instead stated that they voluntarily comply with the agreement between the state and the federal government.

They have put forth the argument that they have promulgated regulations that in an indirect manner will cause them to be able to use 5517 to create a conflict between federal statutes and state statutes and thus use the supremacy clause argument.

I cannot see how the promulgation of a regulation by the Postal Service can be used to bootstrap, when it is expressly limited, expressly not included within 5517.

One other point with respect to 215.12 is that we do not believe that that agreement that is referred to there — the agreement has to do with only payroll holding. That's all that agreement has to do with. That has nothing to do with the delinquent tax liability, and the language of that section does not state that all delinquent tax liabilities cannot be collected from the Postal Service, or from whoever there is.

It just says this agreement here does not authorize it.

I think it has to be very closely looked at.

We are not suing under the agreement. We are suing for violation of two state statutes, Revenue and Taxation Code Section 18818 for the Franchise Tax Board and 1757 of the California Unemployment Insurance Code for the Employment Development Department.

These sections, 5517 of Title 5 and 215.12, or any of the other subsections there, have no applicability to this proceeding because the Postal Service is not included within that statute.

THE COURT: All right. Fine. Thank you.

Mr. Epstein.

The primary argument is that the Postal Service is not included within 215.12(a).

MR. EPSTEIN: Well, your Honor, we feel that 5517 is clearly controlling in this case, as we briefed that argument.

The agreement that counsel referred to is an agreement between the Secretary of the Treasury and the State of California and —

THE COURT: I don't have the text here before me.
I do have it here, yes.

You are referring specifically to what?

MR. EPSTEIN: I'm referring to the paragraph marked 1 where it says:

"The head of each agency of the United States shall comply with the withholding provisions of the State of California income tax law . . ."

and it is pursuant to this overall agreement that the —

THE COURT: You are looking at what page of the brief now?

MR. EPSTEIN: This is Exhibit C, the Healy affidavit, which was attached to the defendant's motion for summary judgment and attached to the Healy affidavit is a copy of the agreement.

THE COURT: I have a copy of 5517 before me. It is page 9 of the government's brief filed on April 30, 1980.

MR. EPSTEIN: And the way it worked, pursuant to the statute, is that the Secretary of the Treasury entered into the agreement on behalf of these agencies and then each agency, like the Postal Service, incorporated the provisions of that agreement into its regulations and handbook material and that is what the Postal Service did.

Now, I think it is pretty clear that the Postal Service considers itself bound by the provisions of this agreement and evidently the State of California and the Postal Service had years of dealing under this agreement, pursuant to which the state taxes were withheld.

The only question that I think maybe is worth discussing is not whether 5517 is applicable, but the problem that arose after the creation of the Postal Reorganization Act when, under 410 of the statute, provisions like 5517 were exempt from the Postal Service. When the Act was created the intent was to remove the labyrinth of laws that had previously been in effect, to recodify only Title 39; in other words, just the postal laws and then eliminate the nonpostal laws, but allow, through certain savings provisions, the discretion

in the Postal Service to retain the rules and regulations which it felt would promote the efficient operation of the Postal Service.

And pursuant to these provisions, and 410, and other savings clause provisions, the Postal Service, in its discretion, decided to retain this regulation that was in its handbook and manual allowing for the continued deduction of state taxes.

But I don't think there is any question about the applicability of 5517 to the Postal Service.

Now, the way we regard this case, this case is not a continuation of the sue and be sued cases which went before. In those cases there was a question of subject matter jurisdiction under the sue and be sued clause of the Postal Act.

We have not raised that as a defense in this suit because of constitutional and statutory prohibitions that otherwise exist which we say bar any action by the State of California here.

And the state keeps trying to bring this back to make it a continuation of the sue and be sued cases.

We think this case is clearly distinguishable.

This case involves administrative levies, not judicial garnishments.

This is a first attempt —

THE COURT: How do you distinguish this situation from that in Goodman's Furniture v. United States Postal Service and the other circuit opinions cited therein?

MR. EPSTEIN: There are a number of distinctions, your Honor.

First of all, as I said, as far as I know only the sovereign immunity defense was raised in those cases.

We are not raising that defense here. We are basing this case more on the merits. And as we briefed, we feel there are a number of arguments which arise pursuant to the statute and the Constitution which bar this action.

Also, this is not a judicial garnishment suit. This is an administrative levy. As far as I know —

THE COURT: What difference should that make?

MR. EPSTEIN: I think it makes a big difference, your Honor, because as far as I know there is no determination of liability in these cases.

THE COURT: In other words, had the state reduced its claim to judgment and levied on that judgment you wouldn't be standing there. Is that what you are saying?

MR. EPSTEIN: That's right, your Honor. We are honoring judicial garnishment and have changed our regulations to honor them.

In judicial garnishments there has been a determination of liability as to the debtor. Here there has been, as far as I know, no determination of liability. And we think, because of the open-ended aspect of it, which would give rise to state imposition of any administrative levy, it's on the discretion of the Postal Service.

There is a clear interference with a government function here, and 5517, as we have believed, has a clear prohibition against the federal agency serving as a collection agent.

That was not the intent of the statute and —

THE COURT: Where is that in the section?

MR. VESELY: That is in the agreement.

MR. EPSTEIN: That is in the agreement. And it is also in the provisions of 5517.

THE COURT: (a) or (b) or what?

MR. EPSTEIN: I think it is (b).

This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States, or its employees, to a penalty or liability because of this section.

THE COURT: If you examine that closely — well, the statute that we're concerned with imposes a burden on the

United States that would be equivalent to the burden that the statute would impose on a private employer, would it not?

MR. EPSTEIN: It would be similar.

THE COURT: Similar. All right.

MR. EPSTEIN: Except, I think there are distinguishing factors because of the setup of the Postal Service. The Postal Service is a nationwide corporation that has post offices throughout the country.

This, of course, would open up and would apply only in California. But, first of all, if this procedure were allowed it would apply to the United States, or could be interpreted as applying to the United States and other federal agencies and could subject the Postal Service to whatever inconsistencies there are in state procedures across the country, contrary to the purpose in 5517, which was to limit the federal functions of withholding only.

And that's why there is express prohibition against a penalty in the statute as well as in the agreement itself.

THE COURT: What you are saying is, it's burdensome because of the fact that we may have fifty states and each state has different requirements and the Postal Service would have to keep up with all those requirements. Is that what your argument is?

MR. EPSTEIN: That's correct.

THE COURT: What about the next clause which subjects the United States or its employees to a penalty or liability because of this section? Are you claiming that a penalty or liability is being imposed?

MR. VESELY: Yes, your Honor.

THE COURT: How?

MR. VESELY: We feel that whatever has been held is the limit of the federal function. This seeks —

THE COURT: Tell me what is the penalty?

MR. EPSTEIN: I would view it in a broad sense. I would view it more under the liability that California is seeking —

THE COURT: So you are saying there is no penalty. Then you want to look at liability.

MR. EPSTEIN: I would seek liability because they are seeking to hold us liable for the unpaid taxes. And that was not the intent of this provision.

We are only serving a withholding function only, and as part of promoting the federal-state cooperation in tax matters, and to facilitate the collection of revenues this agreement was entered into but not, to carry it one step further, or even further than that, to subject federal agencies to this kind of liability and determination every time a debtor is adjudged to be liable for unpaid taxes.

We regard that as a burden on the federal function.

THE COURT: This issue, I take it, has never been resolved by any court?

MR. EPSTEIN: That's correct, your Honor. And we also asked the State of California in our interrogatories whether they had assessed these levies against other federal agencies and they said only the Postal Service.

THE COURT: And the Postal Service will honor a judicial garnishment?

MR. EPSTEIN: A judicial garnishment, and it's in the manual for federal court orders, but I understand a directive has come out which also applies to state court garnishment orders.

THE COURT: Well, Mr. Vesely, then why doesn't the state then proceed by way of a judicial garnishment?

MR. VESELY: There is no requirement under any tax law that the state or federal government, IRS proceeding, have to get a state court judgment or any kind of a judgment. Summary collection procedures have been upheld from the Phillips v. Commissioner case, which I cite in my brief,

and by the United States Supreme Court, and it has been upheld in a number of Ninth Circuit cases — Randall for one, Bomher v. Regan, Kelly v. Springett.

There are all these cases in California where the summary collection procedures, without a state court judgment, is not required.

The policy behind it is the prompt collection of taxes, your Honor.

THE COURT: Well, I know that is important.

What about the provision in 5517(b) about subjecting the United States to a liability?

MR. VESELY: I don't wish to repeat my previous point, your Honor, just the fact though, first of all, is that 5517 states that this section does not give the consent.

Read the language there. It does not give the consent to this kind of an action.

We are not suing under 5517, once again. I want to reemphasize that.

But, secondly, the point of it is that we are not asking anything further of the Postal Service than to turn over property that was belonging to the taxpayer in question.

Now, the fact that they didn't turn over the property at the time of the levy and the orders to hold were served upon them, now it's going to have to turn over property that will come from the Treasury, or wherever it will be coming from.

That seems to be a classic bootstrap argument in itself, your Honor.

I believe what we have here is, we're not seeking to impose a penalty upon the Postal Service at all.

In fact, there is one point I wish to make to your Honor, that one of the tax debtors involved in this action, it was a Mr. Sedberry for the Franchise Tax Board. There was an order to withhold, to serve with respect to him, for approximately \$5,000. It's in the records and in the briefs.

He has recently paid his liability so that if any kind of a judgment were to be rendered in favor of the Franchise Tax Board it would be our position that judgment should be reduced by the \$5,000 amount which Mr. Sedberry's amounted to.

THE COURT: What is the balance of his tax liability?

MR. VESELY: His tax liability is clear and we don't seek the Postal Service to pay anything off. There is no liability there. We are asking for nothing more than the amounts that were owed to those employees and the independent contractors.

THE COURT: How many people does that leave you then?

MR. VESELY: It leaves me with — well, two on the Franchise Tax Board side that I know for sure. They represented that Mr. Norwood was not an employee at the time. We were not aware of that. Our information was that he was employed. So that would leave us with two tax debtors on the Franchise Tax Board side.

McCune is on the Employment Development side. And there were two tax debtors on that side. And now there is only one.

We have no reason to question what they are saying about not owing any money at the time. Our information was that

THE COURT: So the case against Lake and Norwood is moot.

MR. VESELY: Also with respect to Mr. Sedberry on the Franchise Tax Board side. He has paid his liability. We aren't seeking any further money.

THE COURT: So we are left with whom now?

MR. VESELY: McKinley Herd, H-e-r-d, Joseph Stovall, S-t-o-v-a-l-l.

The one point that I wish to make though with respect to this administrative levy versus the judicial garnishment,

your Honor, is that it is a well-settled and long-standing rule of law, not only with respect to state tax liabilities but also with respect to federal tax liabilities, that summary tax collection procedures are constitutional. There is no reason to go in and get a court judgment. It is not necessary. There absolutely is no reason here for us to have to do that.

THE COURT: Why does the Postal Service make a distinction in its own mind, Mr. Epstein, between a judicial garnishment and an administrative garnishment?

MR. EPSTEIN: Well, your Honor, as I stated, there are prohibitions that arise under this situation, with administrative tax levies, that did not exist in the judicial garnishment cases because the administrative levies bring into clash the federal and state schemes, clearly by the prohibitions and —

THE COURT: Why do they bring up any more of a clash than a judicial garnishment?

MR. EPSTEIN: The judicial garnishments, as far as I know, were not involved in the 5517 agreement. These suits involve employees of the Postal Service which are clearly covered under the agreement. In those other cases sovereign immunity was the only defense that was raised and this agreement was not relied on.

THE COURT: Why wouldn't a judicial garnishment fall within the provisions of 5517(b)?

MR. EPSTEIN: I'm not sure of that, your Honor, why it was not treated in those cases. That issue did not arise as far as I know.

The plaintiffs in those cases were not states. That is what creates the clash here.

I think that is the distinction that you are looking for. It's because the State of California is the plaintiff and because it's the State of California, that brings into play directly the conflict —

THE COURT: I mean, is the clash more obnoxious because it is brought on by the state —

MR. EPSTEIN: Yes, your Honor.

THE COURT: — vis-a-vis the clash brought on by private individuals?

MR. EPSTEIN: Yes, your Honor, because it clearly falls within the supremacy clause that disallows state statutes to interfere with federal functions.

There are two prohibitions here. First, there is an actual conflict here, your Honor, an actual conflict that —

THE COURT: Let's say Sears & Roebuck, through a judicial garnishment, serves the Postal Service. That's less onerous than having the State of California come in with its levy against the Postal Service?

MR. EPSTEIN: Yes, your Honor, because there you would only be talking about individual judicial garnishments brought by a private party. That issue had already been litigated.

Here you have an entirely different situation. You have a state instrumentality that is seeking to use its state functions in contravention of a comprehensive federal scheme that was established and under actual conflict —

THE COURT: But if the state took an additional step and used its own judicial process, then that would eliminate all obnoxious element in the procedure; is that what you are saying?

MR. EPSTEIN: That is correct.

THE COURT: Does that make sense?

MR. EPSTEIN: I think it makes sense, your Honor, because I think there is a big distinction between an administrative levy and a judicial garnishment.

In a judicial garnishment order there has already been a determination of liability.

THE COURT: Well, in an administrative levy isn't there a self-determination of liability?

MR. EPSTEIN: That may be, your Honor, but that could give rise to due process questions. That could poten-

tially subject the Postal Service to liability in other suits, in suits by employees or contractors.

I think it's the frustration and the burden on the federal scheme that led to the prohibitions in the federal statutes. That is exactly why the statute was intended to be limited to withholding only and not get states involved in making the federal agencies collection agencies because that would

THE COURT: But the federal agencies are collection agencies if the collection is performed pursuant to a judicial garnishment.

MR. EPSTEIN: That is true, your Honor, but you have got a private party — it's a one-kind-of-a-thing, with an employer bringing a judicial garnishment for "X" and not dealing with a state entity that brings in this clash between state and federal, where you have got one power, one instrumentality, trying to prevail over a scheme that has been established and under the supremacy clause —

THE COURT: When a private individual comes in with a judicial garnishment you have that private individual seeking to enforce a state writ. So you have the same clash here as this.

MR. EPSTEIN: Well, under the cases that we have cited in our brief, aside from —

THE COURT: Logically, really, do you see any difference in all this?

MR. EPSTEIN: I do, your Honor, under the case law.

THE COURT: Forget about the case law. Let's just talk about logic and common sense.

MR. EPSTEIN: I think this is too open-ended. I don't think there is any way that a federal agency could deal with this kind of a situation. They would not know at this point what this would entail and how this would affect their operations and what this would subject them to. It's hard to generalize as to the impact of the particular burden that it would have on the operation.

THE COURT: In other words, there is less likelihood of volume of these writs, or whatever you want to call it, forgetting the state, forgetting the federal government, if the state is required to go through its own judicial machinery?

MR. EPSTEIN: I would think so, your Honor.

THE COURT: It makes it tough on the state, and in some states the employee just then would like the power to mail out these letters. He would have to go down to the courthouse and follow whatever procedure the state establishes there and get his judicial garnishment which, of course, doesn't require that the matter be reduced to a judgment.

MR. EPSTEIN: It is my understanding that in the judicial garnishment, most of the judicial garnishment situations, there has been a determination of liability and that is not true in the administrative levy sense.

THE COURT: Is a determination of liability necessary also in order to get a state judicial garnishment?

MR. EPSTEIN: That is my understanding.

MR. VESELY: Excuse me.

THE COURT: Did you hear my question? Is a state judicial determination of liability necessary in order to get a state judicial garnishment?

MR. VESELY: No, it isn't, your Honor. The point of it is that —

THE COURT: You just go down to the clerk's office with the affidavits and post whatever bond they want and you get your writ and you can run over to the Postal Service and serve them.

MR. VESELY: The point of it is that there is no need to go —

THE COURT: Is that the way it could work?

MR. VESELY: We don't do that very often — that is the point — because we don't have to do it.

THE COURT: I just asked you if that is the way it would work. I haven't practiced law in the state courts for fifteen years.

MR. VESELY: There are procedures under the Revenue and Taxation Code where we go down with a final liability, such as liabilities like this, and these taxpayers have had the opportunity to contest this, these liabilities, and as I said on the Franchise Tax Board side, and also I think partially on the Employment Development Department side, these were self-assessed where the taxpayers actually wrote these tax dollars down on their reports, or returns, and said, "This is what I owe but I'm not paying you now," so they never paid. They have a period of time to protest

THE COURT: I understand that.

MR. VESELY: On the revenue and taxation side there is a procedure for going down and getting a certificate of judgment, which is nothing more than a lien, which can then be filed in various counties and whatever. There are number of various remedies available to the state agencies. They are all cumulative. You can use any one which does not foreclose you from another one.

The Franchise Tax Board decided to use the order to withhold.

THE COURT: And one that would be easily attainable would amount to a judicial garnishment?

MR. VESELY: We could file suit for the tax in court. That is one of the procedures that is available, if we were so inclined. We do that more often maybe with an out-of-state defendant where we have to get a judgment for this state for the out-of-state. That is the only way we would ever use it.

All of the procedures aren't equal. Once the liability becomes final under California Code of Civil Procedure Section 722.5 it says we have the entire status of a judgment

creditor, these agencies have status of judgment creditor, they have all the remedies available to them of a judgment creditor at that time and they can do what you are saying. But they are not required to do one or the other. They can use any one of these, they can use them in combination or to the exclusion, or whatever they want to. And the Employment Development Department can use its levy or warrant or by liens or use any of the Franchise Tax Board remedies of collection.

The whole point of this is that before any of these various collection devices are used the liability is a final liability. The party has had an opportunity to contest it and the party has a further opportunity, once the taxes are paid, to then go through the claim for refund and sue for refund route.

That procedure has been upheld to be constitutional and there is absolutely no difference here between a state court judgment garnishment and these administrative levies, as counsel would have.

There is one last point I would like to make, if I could.

This constant referral to interference with the functions of the Postal Service. It is interesting to me to note that although the Postal Service states that they are not relitigating the sue and be sued clause, this is an identical argument that was put forth in the sue and be sued clause cases and it was rejected in a number of cases.

I referred to that in my brief. I see nothing different in this case.

THE COURT: Your position in a nutshell, Mr. Vesely, is that the Postal Service is not the beneficiary of sovereign immunity and, therefore, is amenable to sue as any private individual or private entity would be.

MR. VESELY: Yes, your Honor.

THE COURT: That is the bottom line.

MR. VESELY: That is it.

THE COURT: And the bottom line to your argument, Mr. Epstein, I take it, is that — and correct me if I am

wrong — that under 5517(b), the procedure followed by the state, the administrative levy process subjects the United States to a liability.

MR. EPSTEIN: Your Honor, I would like to add, in reference to Section 5517 the contract and also the federal regulation. I did not mention that. It is in my brief, but I did not mention the (b) part, which also clearly applies here.

It says:

"Nothing in this agreement shall be deemed to require collection by agencies of the United States of delinquent tax liabilities of federal employees . . . or members of the armed forces."

I cited the (b) part but there is also the (a) part which contains the —

THE COURT: You are talking about 215.12?

MR. EPSTEIN: 215.2.

THE COURT: 215.2(a)?

MR. EPSTEIN: Yes, (a). And also the express provisions of the Section 5517 contract, which bars collection to require the —

THE COURT: Well, the Postal Service isn't asserting it is the beneficiary of sovereign immunity; correct?

MR. EPSTEIN: Yes. But it is asserting immunity from state regulation.

THE COURT: What is the difference between that and sovereign immunity?

MR. EPSTEIN: That argument is a constitutional argument which is a corollary to the supremacy clause.

It has nothing to do with jurisdiction or lack of jurisdiction, over the subject matter as conferred or not conferred by a federal statute.

This is a constitutional-based argument which prevents interference by states.

There is a federal immunity from this kind of state regulation or taxation. It's recognized by many Supreme Court

cases which are cited in our brief and I have to emphasize against the distinction between the state trying to impose this and some other party.

The case law clearly puts the federal-state clashes in the context of the supremacy clause, and this immunity — this corollary, which emanates from the supremacy clause, I think makes considerable difference in this case.

The State of California talks about the propriety of summary proceedings. That may be true with respect to private parties, but when you're talking about this kind of procedure, as it affects a federal agency, you are getting in another area that rises to constitutional dimensions.

And here you don't even have to reach the immunity argument because you have already got an actual conflict on the provisions of 5517 and the state statutes.

But then you have an additional argument on the immunity because this clearly falls within the kind of immunity that federal instrumentalities were to be protected against, and it is not to be confused with the immunity from sue and be sued.

That is not an issue here. We have not raised that.

THE COURT: All right. Do you want to close. Mr. Vesely?

MR. VESELY: Yes, your Honor, just one short point.

The only point that I would like to reemphasize is with respect to this 5517 section and with respect to 215 of the C.F.R.

Under both circumstances, your Honor, I think it must be very closely looked upon that those sections, along with Section 410 of Title 39, which expressly states which section shall apply to the Postal Service, and does not include 5517, but does include 5520 with respect to city and county taxes and 5520 is one of the sections, along with 5517 and 5516 which go into giving the authority for promulgating Section 215 of the C.F.R.

5520(c)(4) refers to the Postal Service expressly being a party to those agreements with respect to city and county taxes, but 5517 does not have such a proviso in it.

Why 5517 was not included within the listing in 410, I know there are a lot of sections being thrown around here, but —

THE COURT: The bottom line of your argument is that 5517 does not apply.

MR. VESELY: It does not apply to this action, and the only reason it is being brought into this whole thing, in our view, is to attempt to create a conflict between federal and state statutes where there is no conflict.

5517 does not apply to this case. There is no conflict between statutes now. So, therefore, any supremacy clause argument is just inappropriate.

My other arguments I have put forth already, your Honor, about the various things and have been handled in the briefs, I believe, and I have nothing further.

Thank you, your Honor.

THE COURT: All right. One last word?

MR. EPSTEIN: Your Honor, this is a technical argument, but the 5520 that counsel refers to, there is an easy explanation as to why that is specifically mentioned, and that is because the Postal Service — that is a subsequent statute to 5517 which the Postal Service had long been complying with and it was not necessary to reenact 5517 into 410 because it was the practice of the agency, as recognized in its regulations, to comply with it, and 5520 was added. And what you have is, you view the provision in its total, 5517 and 5520 both viewed the same way would make no sense to have it one way for city taxes and another way for state taxes.

And the Braun affidavit, which is attached to our supplemental motion, clearly goes into the transition between the old Postal Act and the new Postal Act which gave the

Postal Service the discretion to retain those statutes which it felt — and those rules and regulations which it felt — would promote the efficient operation of the Postal Service.

5517 is a clear example of one that would promote the efficient operation.

It is of assistance to the state to have this withholding scheme taking place, and it was always the intent of the Postal Service to retain this, and as it appears in the manual and handbook provisions. So it is there. It was there under the old statute, it is there under the new one.

I also have difficulty in following plaintiff's argument as to why it does not feel that 5517 is involved in this case. The scheme was a relationship, contracts to be entered into between the Secretary of the Treasury and states on behalf of federal agencies and the Postal Service then incorporated compliance with this agreement in its own regulations and manual and handbook provisions — long operating practice relationship between the state and the Postal Service in this regard.

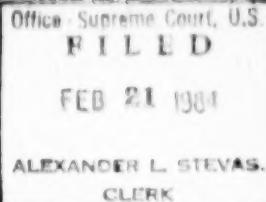
Clearly, 5517 is in this suit as a direct issue and can't be ignored, and the express language of that provision bars the enforcement action that the plaintiff is seeking here.

And, finally, I just want to emphasize again that because it is the State of California there are essential issues which arise here of constitutional dimension which prohibit the actions that the plaintiff is seeking.

THE COURT: All right. The matter will stand submitted.

MR. VESELY: Thank you, your Honor.

MR. EPSTEIN: Thank you, your Honor.



No. 83-372

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant.

vs.

UNITED STATES POSTAL SERVICE,

Appellee.

Appeal from the United States Court of
Appeals for the Ninth Circuit.

JOINT APPENDIX.

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Appeal Docketed August 31, 1983.
Probable Jurisdiction Noted Jan. 9, 1984.

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Documents Contained In Jurisdictional Statement.

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement.

Judgment of the District Court for the Central District of California, filed July 7, 1980....	A17
Findings of Fact and Conclusions of Law of the District Court for the Central District of Cal- ifornia, filed August 6, 1980.....	A19
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Docket Entries.

DATE	NR.	PROCEEDINGS
12-13-78	dg	1. Fld complt. issd summs Case may be ref to Mag Penne
12-26-78	lf	2. Fld retrn of sms. servd US Postal Service on 12-21-78
1/24/79	nm	3. Fld ORD(HP)(RF), dtd 1/24/79, transfg the actn to the cal of Judge Pregerson for all fur procdgs. Attys notified.
2/16/79	jcd	4. Fld Stip and ORDER ext'g ti for deft to respnd to complt to 3/23/79.
3/23/79	jcd	5. Fld deft's ANSWER to complt.
5/10/79	jcd	6. Fld Crt's Notc of PTC and Ord re unservd ptys. retbl 7/30/79, 9a.m.
5/23/79	jcd	7. Fld Stip and ORD ext'g ti for pltf to respnd to deft's 1st interrogs to 6/8/79.
7/17/79	jcd	8. Fld Stip and ORD cont'g PTC to 9/24/79, 9a.m.
9/5/79	jcd	9. Fld Stip and ORD cont'g PTC to 11/19/79 and that the ptys shall fi cross motns for S/J to be heard on 11/19/79, 9am
10/11/79	jcd	10. MIN ORD: On Crt's own motn mttr has been set for a stat conf and settlmnt conf on 10/26/79, 1p.m.
10/25/79	jcd	11. Fld Stip and ORD cont'g hrg on x-motns for S/J to 1/22/80, 9a.m.
11/1/79	jcd	12. Fld Stip and ORD consolidating actns, flg of cross- motns for S/J by 12/28/79 and a response to the respective motns by 1/9/80. The hrg on the motns shall be held on 1/21/80, 9a.m.
5/12/80	pg	13. Fld Stip & ORD for cong of hrg on motn for S/J re X/motns is cont to 6/24/80, 1:30pm. cont of flg opp to defts motn for S/J is cont to 5/19/80 & defts will fl a resp to 5/30/80
5/19/80	pg	14. Fld pltfs Suppl memo of P&A in supt of pltfs motn for S/J & in opp to defts motn for S/J.
6-24-80	cg	15. MIN ORD: hrg x-motns for S/J cnsl present args crt taks motns under subm

DATE	NR.	PROCEEDINGS
7/7/80	lp	16. Fld Judgmnt & ORD (Consent) that judgmnt be entered in favor of deft & against pltfs dismg these consolidated actn. (ENT 7/9/80) Mld copy. MD JS-6.
7/7/80	lp	17. Fld findings of fact & conclusions of law. (ENT 7/9/80)
8/6/80	rlb	18. Fld ORD that the finds of fact & cnslc of law fld 7/7/80 & entered 7/9/80 are vacated; Fur ORD the finds of fact & cncls of law fld this dt shall constitute the Crt's finds of fact & cncls of law in suppt judgmnt ent 7/9/80. (Ent 8/8/80 m/cpys & ntfid prtys)
		19. Fld finds of fact & cncl of law.
9-3-80	iw	20. Fld pltfs' NOTC OF APPEAL to 9th cir C/A frm jdgmt ent 7-9-80 \$70.00 fldng & docket fees pd.
9-12-80	kt	21. Fld pltf/appellant's desig of rptr's transc of oral proceedgs for rec on appeal
2-19-81	yd	22. Fld pltfs designatn of Clerk's record on appeal
8-5-81	yd	23. Fld appellee's designatn of Clerk's record on appeal
6/17/83	am	LODGED cpy of 9th Cir C/A ord affirming jgmt of D.C. (CA 80-5694, 80-5700)
7/21/83	gth	24. MIN ORD: Ord that jdmt of USCA revers USDC on CV 78-4014 & affirmng USDC on CV 78-4746 be fld & spread. (eNT 7/22/83)

**Agreement Between the Secretary of the Treasury and
the State of California Pursuant to Section 5517 of
Title 5 of the United States Code and Executive Order
10407 Dated November 6, 1952.**

Pursuant to 5 U.S.C. 5517 and Executive Order 10407, dated November 6, 1952, it is hereby agreed by the Secretary of the Treasury and the State of California as follows:

1. The head of each agency of the United States shall comply with the withholding provisions of the State of California income tax law, regulations, procedural instructions and reciprocal agreements, which are applicable to employers generally, except as otherwise provided herein, with respect to employees of such agency who are subject to such tax and whose regular place of Federal employment is within the State of California.
2. The provisions herein are effective with respect to wages to be paid, commencing with the first whole pay period, after execution of this agreement as evidenced by the date of the last signature below.
3. Nothing in this agreement shall be deemed:
 - (a) to apply with respect to compensation for services as a member of the Armed Forces of the United States; or
 - (b) to require collection by agencies of the United States of delinquent tax liabilities of Federal employees; or
 - (c) to consent to the application of any provision of law of the State of California which has the effect of (1) imposing more burdensome requirements upon the United States than it imposes on other employers, or (2) subjecting the United States or any of its officers or employees to any penalty or liability, or (3) requiring the observance of pro-

cedures which do not substantially conform to the usual fiscal practices of agencies of the United States.

4. The compensation of Federal employees on which the income tax shall be withheld shall be their "wages" as defined in Section 3401(a), as amended, of the Internal Revenue Code of 1954 and regulations issued thereunder. Withholding shall not be required on wages earned but unpaid at the date of an employee's death, which is consistent with the Federal rule.
5. State income tax will be withheld only on the entire compensation of Federal employees. Nonresident employees who, under the State income tax law, must allocate at least three-fourths of their compensation to the State of California will be subject to withholding on their entire compensation. Nonresident employees who, under the California income tax law, must allocate less than three-fourths of their compensation to the State may elect to (1) have State income tax withheld on their entire compensation, or (2) have no California income tax withheld on their compensation.
6. Without regard to otherwise applicable law, regulations, procedural instructions or reciprocal agreements of the State of California, the method for calculating the amount to be withheld from an employee's salary shall be discretionary with the employing Federal agency provided the method used shall produce approximately the equivalent tax required to be withheld from the compensation of each employee subject to the income tax.
7. Where it is the practice of a Federal agency under Federal tax withholding procedure to make returns and payment of the tax on an estimated basis, subject to

later adjustment based on audited figures, this practice may be applied with respect to the State income tax where the agency has made appropriate arrangements with the State income tax authorities.

8. Copies of Federal Form W-2, "Wage and Tax Statement," may be used for reporting withheld taxes to the State of California.
9. As used in this agreement, the terms "agency," "Armed Forces of the United States," "employees" and "regular place of Federal employment" shall have the meanings defined in Executive Order 10407.
10. This agreement supersedes any previous agreement between the Secretary of the Treasury and the *State of California* pursuant to the cited authority. Further, this agreement shall be subject to any amendments of the provisions of 5 U.S.C. 5517 and to any rules and regulations issued thereunder and amendments thereto.

Date Feb. 4, 1974

/s/ David Lyman
Commissioner of Government
Financial Operations

State of California

Date February 25, 1974

By: /s/
Executive Officer
Franchise Tax Board

TECHNICAL EXPLANATION

1. *Paragraph 1* has been revised (a) for clarity, to state specifically that agencies shall comply with the withholding provisions of law, regulations, procedural instructions, and reciprocal agreements (prior agreements made reference only to compliance with the law.), and (b) to include the phrase "which are applicable to employers generally," which criterion is implicit in Executive Order 10407.

2. *Paragraph 2* specifies uniformly when the withholding of tax shall commence.

3. *Paragraph 3(c)(3)* has been added so as to provide a basis to ascertain that state requirements conform to our usual fiscal practices, which is consistent with the Executive Order which requires that agreements "shall provide for procedures for the withholding, the filing of returns, and the payment of the tax to the State or Territory which conform, in so far as practicable, to the usual fiscal practices of agencies of the United States."

4. *Paragraph 5* provides for withholding uniformly only on the entire compensation of employees subject to the tax, including nonresident employees who allocate at least three-fourths of their compensation to a state. Nonresident employees allocating less than three-fourths of their compensation to a state may, optionally, have state income tax withheld on their entire income. This latter provision would involve few employees, since it is most unusual that an employee whose regular place of Federal employment is within a state would be in the position of allocating less than three-fourths of his compensation to that State.

The purpose of paragraph 5 is, of course, to provide uniformly for withholding only on the entire compensation of Federal employees. The practice followed by many States of imposing a tax and withholding requirements on that part

of the compensation of nonresidents which is allocable to the taxing State creates problems in large centralized payroll operations. Under these conditions, employees in this category must be treated differently for tax withholding purposes depending upon what percentage of their compensation is allocable to the taxing State.

5. *Paragraph 6* is to allow Federal agencies to compute State tax withholding by using any withholding method which shall produce approximately the equivalent tax required to be withheld from the compensation of each employee subject to the income tax.

The purpose of this paragraph is (1) to provide large Federal agencies with alternative methods for withholding state income tax in a manner that is suitable for their large centralized payroll systems, (2) to encourage uniform withholding of state income tax by all agencies, and (3) to waive the "prior approval" requirements as prescribed by certain states for use of a percentage or formula withholding method.

**Complaint for Damages for
Failure to Deliver Personal
Property Levied Upon.**

United States District Court, Central District of California.
Franchise Tax Board, Plaintiff, v. United States Postal Service, Defendant. No. 78 4746.

Filed: December 13, 1978.

COMES NOW, plaintiff, who alleges as follows:

FIRST CAUSE OF ACTION

1. The State of California, Franchise Tax Board ("Board") is the duly constituted governmental agency charged with the administration, imposition, enforcement and collection of taxes under the California Revenue and Taxation Code.
2. Jurisdiction is conferred upon this Court by Section 409(a) of Title 39 of the United States Code for the reason that this action is brought against the Postal Service. Defendant, the United States Postal Service ("Postal Service") is, and at all times material herein was, an establishment of the executive branch of the Government of the United States and doing business in Los Angeles County.
3. Section 18817 of the California Revenue and Taxation Code provides for the levying on employer's obligors.
4. The Board is authorized to issue a Notice to Withhold according to the provisions of section 18817 of the California Revenue and Taxation Code.
5. The Board is informed and believes and on that basis alleges that McKinley Herd ("Herd"), is, and at all times material herein was, a resident of the County of Los Angeles, State of California, and an employee of the Postal Service.

6. Herd is indebted to the Board for unpaid taxes for the year 1972 in the sum of \$1,577.16, plus applicable interest.

7. The 1972 tax liability of Herb is secured by Lien Certificate Number 25-03789 recorded in Los Angeles County on February 14, 1977 as instrument 77-158024. The 1974 tax liability of Herd is also secured by Lien Certificate Number 21-09544 recorded in Los Angeles County on February 19, 1976 in Book M5258, Page 224. True copies of the lien certificates are attached hereto as Exhibits "A" and "B", respectively, and by such reference incorporated herein as though set forth in full.

8. On or about July 28, 1978, the Postal Service was served notice pursuant to section 18817 of the California Revenue and Taxation Code that tax debtor Herd was delinquent in payment to the Board in the amount of \$1,577.16.

9. The notice referred to in the paragraph immediately above levied upon the credits or payments paid or owed to Herb by the Postal Service, a true copy of which notice is attached hereto as Exhibit "C" and by such reference incorporated herein as though set forth in full.

10. The Postal Service in responding to said notice denied that any funds owed to Herd were subject to an Order to Withhold, a true copy of which denial wherein the Postal Service denies the order is attached hereto as Exhibit "D" and by such reference incorporated herein as though set forth in full.

11. The Postal Service is an obligor of Herd because on or about July 28, 1978 it had in its possession personal property payable to Herd.

12. Under section 18818 of the California Revenue and Taxation Code, the Postal Service as an obligor is liable to

the Board for the amount the Postal Service owed to Herd at the time of the service of the Notice to Withhold up to the sum of \$1,577.16.

SECOND CAUSE OF ACTION

13. The Board realleges paragraphs 1 - 4, inclusive, at this point and by such reference incorporates said paragraphs herein as though set forth in full.

14. The Board is informed and believes and on that basis alleges that Wallace E. Norwood ("Norwood") is, and at all times material herein was, a resident of the County of Los Angeles, State of California, and an employee of the Postal Service.

15. Norwood is indebted to the Board for unpaid taxes for the year 1974 in the sum of \$952.21, plus applicable interest.

16. The 1974 tax liability of Norwood is secured by Lien Certificate Number 21-10045, recorded in Los Angeles County on July 13, 1976 in Book M5404, Page 472, a true copy of which lien certificate is attached hereto as Exhibit "E" and by such reference incorporated herein as though set forth in full.

17. On or about August 15, 1978, the Postal Service was served notice pursuant to section 18817 of the California Revenue and Taxation Code that tax debtor Norwood was delinquent in payment to the Board in the amount of \$952.21.

18. The notice referred to in the paragraph immediately above levied on the credits or payments paid or owed to Norwood by the Postal Service, a true copy of which notice is attached hereto as Exhibit "F" and by such reference incorporated herein as though set forth in full.

19. The Postal Service in responding to said notice denied that any funds owed to Norwood were subject to an Order to Withhold, a true copy of which denial wherein the

Postal Service denies the order is attached hereto as Exhibit "G" and by such reference incorporated herein as though set forth in full.

20. The Postal Service is an obligor of Norwood because on or about August 15, 1978 it had in its possession personal property payable to Norwood.

21. Under section 18818 of the California Revenue and Taxation Code, the Postal Service as an obligor is liable to the Board for the amount the Postal Service owed to Norwood at the time of the service of the Notice to Withhold up to the sum of \$952.21.

THIRD CAUSE OF ACTION.

22. The Board realleges paragraphs 1 - 4, inclusive, at this point and by such reference incorporates said paragraphs as though set forth in full.

23. The Board is informed and believes and on that basis alleges that Cecil C. Sedberry ("Sedberry") is, and at all times material herein was, a resident of the County of Los Angeles, State of California, and an employee of the Postal Service.

24. Sedberry is indebted to the Board for unpaid taxes for the years 1972, 1973 and 1974 in the total sum of \$5,086.60, plus applicable interest.

25. The 1972, 1973 and 1974 tax liabilities of Sedberry are secured by Lien Certificate Number 21-08967 recorded in Los Angeles County on May 15, 1975 in Book M5010, Page 822. The 1975 and 1976 tax liabilities are also secured by Lien Certificate Number 21-11127 recorded in Los Angeles County on March 1, 1978 as instrument 78-224224. True copies of the lien certificates are attached hereto as Exhibits "H" and "I," respectively, and by such reference incorporated herein as though set forth in full.

26. On or about August 22, 1978, the Postal Service was served notice pursuant to section 18817 of the California Revenue and Taxation Code that tax debtor Sedberry was delinquent in payment to the Board in the amount of \$5,086.60.

27. The notice referred to in the paragraph immediately above levied on the credits or payments paid or owed by Sedberry by the Postal Service, a true copy of which notice is attached hereto as Exhibit "J" and by such reference incorporated herein as though set forth in full.

28. The Postal Service in responding to said notice denied that any funds owed to Sedberry were subject to an Order to Withhold, a true copy of which denial wherein the Postal Service denies the order is attached hereto as Exhibit "K" and by such reference incorporated herein as though set forth in full.

29. The Postal Service is an obligor of Sedberry because on or about August 22, 1978 it had in its possession personal property payable to Sedberry.

30. Under section 18818 of the California Revenue and Taxation Code, the Postal Service as an obligor is liable to the Board for the amount the Postal Service owed to Sedberry at the time of the service of the Notice to Withhold up to the sum of \$5,086.60.

FOURTH CAUSE OF ACTION

31. The Board realleges paragraphs 1 - 4, inclusive, at this point and by such reference incorporates said paragraphs herein as though set forth in full.

32. The Board is informed and believes and on that basis alleges that Joseph Stovall ("Stovall") is, and at all times material herein was, a resident of the County of Los Angeles, State of California, and an employee of the Postal Service.

33. Stovall is indebted to the Board for unpaid taxes for the years 1972 and 1973 in the total sum of \$729.45, plus applicable interest.

34. The 1972 and 1973 tax liabilities of Stovall are secured by Lien Certificate Number 21-09161 recorded in Los Angeles County on July 25, 1975 in Book M5073, Pages 662, a true copy of which lien certificate is attached hereto as Exhibit "L" and by such reference incorporated herein as though set forth in full.

35. On or about August 22, 1978, the Postal Service was served notice pursuant to section 18817 of the California Revenue and Taxation Code that tax debtor Stovall was delinquent in payment to the Board in the amount of \$729.45.

36. The notice referred to in the paragraph immediately above levied on the credits or payments paid or owed to Stovall by the Postal Service, a true copy of which notice is attached hereto as Exhibit "M" and by such reference incorporated herein as though set forth in full.

37. The Postal Service in responding to said notice denied that any funds owed to Stovall were subject to an Order to Withhold, a true copy of which denial wherein the Postal Service denies the order is attached hereto as Exhibit "N" and by such reference incorporated herein as though set forth in full.

38. The Postal Service is an obligor of Stovall because on or about August 22, 1978 it had in its possession personal property payable to Stovall.

39. Under section 18818 of the California Revenue and Taxation Code, the Postal Service as an obligor is liable to the Board for the amount the Postal Service owed to Stovall at the time of the service of the Notice to Withhold up to the sum of \$729.45.

WHEREFORE, the Board prays:

1. For Judgment in the amount of \$1,577.16 on the First Cause of Action;
2. For Judgment in the amount of \$952.21 on the Second Cause of Action;
3. For Judgment in the amount of \$5,086.60 on the Third Cause of Action;
4. For Judgment in the amount of \$729.45 on the Fourth Cause of Action;
5. For its costs of suit incurred herein;
6. For such further relief as the Court may deem just, necessary and proper.

EVELLE J. YOUNGER, Attorney General

PHILIP C. GRIFFIN,

LAWRENCE K. KEETHE,

Deputy Attorneys General

By /s/ Lawrence K. Keethe

LAWRENCE K. KEETHE

Attorneys for Plaintiff

EXHIBIT A.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LB:C:LM:CR

Certificate of Amount of Tax, Interest, and Penalties Due

(Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code)

Certificate Number: 25-03789

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: MC KINLEY HERD

Social Security No.: 553 32 9941

Corporate No.:

Last Known Address: 415 N. WILLOW, COMPTON
CA 90221

For Taxable Years: 1972 - 72-03697676

Tax \$655.00, Penalties \$327.50, Interest \$262.03,
Cost(s) \$6.00, Total \$1,250.53.

That further interest will accrue at the rate prescribed by law until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned to execute this Certificate in its name.

—16—

Dated: February 11, 1977, FRANCHISE TAX BOARD
of the State of California

By /s/ I.D. Samford
I.D. SAMFORD

[SEAL]

This is to certify that this is a full, true and correct copy
of the original document on file with the Franchise Tax
Board.

Martin Huff, Executive Officer
By /s/ V. Fosch

EXHIBIT B.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LA-C:SE:bl

Certificate of Amount of Tax, Interest, and Penalties Due

(*Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code*)

Certificate Number: 21-09544

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid of said taxpayer as follows:

Name of Taxpayer: MCKINLEY HERD

Social Security No.: 553-32-9941

Corporate No.:

Last Known Address: 415 North Willow, Compton,
California 90221

For Taxable Years: 1971-02467178 1974--75-
25571673

Tax \$117.39, Penalties \$134.12, Interest \$79.68,
Cost(s) \$6.00, Total \$337.19;

That further interest will accrue at the rate prescribed by law per year until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned to execute this Certificate in its name.

—18—

Dated: February 17, 1976, FRANCHISE TAX BOARD
of the State of California

By /s/ R. E. Bancroft

R. E. BANCROFT

TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy
of the original document on file with the Franchise Tax
Board.

Martin Huff, Executive Officer

By /s/ V. FORSCH

EXHIBIT C.

ORDER TO WITHHOLD
PERSONAL INCOME TAX

PLEASE RETURN THIS COPY WITH A CHECK PAYABLE TO THE FRANCHISE TAX BOARD. IF NO MONEY IS DUE THE TAXPAYER PLEASE RETURN THE BLUE COPY.

[Letterhead]

State of California, Franchise Tax Board.

July 28, 1978 ma

POSTMASTER

ATTN: PERSONNEL SECTION
LOS ANGELES, CA 90052

Soc. Sec. No. 553 32 9941

Taxpayer: MCKINLEY HERD

Account No.: 553 32 9941HERD

Total Due: \$1,577.16

Year(s): 1971 - 71-02467178, 1972 - 77-70084197, 1973
- 73-03764250, 1974- 75-25571673, 1975 - 75-
03764248

THE FRANCHISE TAX BOARD of the State of California hereby notifies you that the total amount of tax, penalty, and interest was not paid when due and is now due, owing and unpaid as shown.

WHEREFORE, on behalf of the People of the State of California, you are required to deduct and withhold the above amount from any credits or payments of any nature due, owing and unpaid to the taxpayer and forward the amount to this office with a remittance made payable to the Franchise Tax Board attached to the original copy. If no money is due the taxpayer please complete the questionnaire on the blue copy and return it (Section 18817 of the Revenue and Taxation Code).

—20—

FAILURE TO WITHHOLD and remit the amount due to the Franchise Tax Board may make you liable for such amount (Section 18818 of the Revenue and Taxation Code).

YOU ARE NOT LIABLE to the taxpayer for any amounts that you are required to withhold and pay to this Board (Section 18819 of the Revenue and Taxation Code).

M. BONNEMA
Collection Section

IMPORTANT!

PLEASE GIVE THE COPY OF THIS ORDER TO THE TAXPAYER AS SOON AS POSSIBLE. The taxpayer should contact one of our offices immediately if this order should not be complied with.

EXHIBIT D.

[Letterhead]

United States Postal Service
WESTERN REGION
San Bruno, CA 94099

August 1, 1978

In reply refer to:

020:59-E-3:LTJ:j

State of California

Franchise Tax Board

Collection Section

3530 Atlantic Avenue

Long Beach, CA 90807

Re: McKinley Herd, SSN 553 32 9941

Gentlemen:

We are returning herewith the Order to Withhold Personal Income Tax which you forwarded to the Postmaster in Los Angeles. It is our understanding that your Headquarters office and the office of the State Attorney General agree that such orders are not applicable to federal agencies such as the United States Postal Service. If this understanding is not correct, please contact us further.

Yours very truly,

/s/ Lyman T. Johnston

Lyman T. Johnston

Regional Counsel

Enclosure

EXHIBIT E.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD

LA-C:EB:rp

Certificate of Amount of Tax, Interest, and Penalties Due

(*Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code*)

Certificate Number: 21-10045

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: WALLACE E. NORWOOD
AND/OR
YOULES M. NORWOOD

Social Security No.: 556-56-2739 (H) 556-78-7359
(W)

Corporate No.:

Last Known Address: 308 E. 11th Street, Los Angeles, California 90061

For Taxable Years: 1973-03479384; 1974-025108481

Tax \$1,769.38, Penalties \$857.95, Interest \$188.21,
Cost(s) \$6.00, Total \$2,821.54

That further interest will accrue at the rate prescribed by law until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the un-

designed to execute this Certificate in its name.

Dated: July 9, 1976, FRANCHISE TAX BOARD
of the State of California.

By /s/ A. D. Kinnett
A. D. KINNETT
TAX COMPLIANCE SUPERVISOR I
[SEAL]

This is to certify that this is a full, true and correct
copy of the original document on file with the Franchise
Tax Board.

Martin Huff, Executive Officer
by /s/ V. Forsch

EXHIBIT F.

ORDER TO WITHHOLD
PERSONAL INCOME TAX

PLEASE RETURN THIS COPY WITH A CHECK PAYABLE TO THE FRANCHISE TAX BOARD. IF NO MONEY IS DUE THE EMPLOYEE, PLEASE RETURN THE BLUE COPY.

[Letterhead]

State of California, Franchise Tax Board.

August 15, 1978

LA-C:KI:aep

U. S. Post Office

Personnel Section

Los Angeles, CA 90052

Soc. Sec. No. 556-56-2739

Taxpayer: WALLACE E. NORWOOD

Account No.: 556-56-2739NORW

Total Due: \$952.21

Years(s): 1973, 1975, 1975

THE FRANCHISE TAX BOARD of the State of California hereby notifies you that the total amount of tax, penalty, and interest was not paid when due and is now due, owing and unpaid as shown.

WHEREFORE, on behalf of the People of the State of California, you are required to deduct and withhold the above amount from any credits or payments of any nature due, owing and unpaid to the taxpayer and forward the amount to this office with a remittance made payable to the Franchise Tax Board attached to the original copy. If no money is due the employee, please complete the questionnaire on the blue copy and return it (Section 18817 of the Revenue and Taxation Code).

FAILURE TO WITHHOLD and remit the amount due to the Franchise Tax Board may make you liable for such

amount (Section 18818 of the Revenue and Taxation Code).

YOU ARE NOT LIABLE to the taxpayer for any amounts that you are required to withhold and pay to this Board (Section 18819 of the Revenue and Taxation Code).

Collection Section

IMPORTANT!

PLEASE GIVE THE COPY OF THIS ORDER TO THE TAXPAYER AS SOON AS POSSIBLE. The taxpayer should contact one of our offices immediately if this order should not be complied with.

EXHIBIT G.

[Letterhead]

**United States Postal Service
WESTERN REGION
San Bruno, CA 94099**

August 23, 1978

In reply refer to:

020:59-E-3:LTJ:j

State of California

Franchise Tax Board

Collection Section

3200 Wilshire Blvd.

Los Angeles, CA 90010

Re: Wallace E. Norwood, SSN 556-56-2739

Gentlemen:

We are returning herewith the Order to Withhold Personal Income Tax which you forwarded to the Postmaster in Los Angeles. It is our understanding that your Headquarters office and the office of the State Attorney General agree that such orders are not applicable to federal agencies such as the United States Postal Service. If this understanding is not correct, please contact us further.

Yours very truly,

/s/ Lyman T. Johnston

Lyman T. Johnston

Regional Counsel

Enclosure

EXHIBIT H.

**STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LA-C:KI:jg**

Certificate of Amount of Tax, Interest, and Penalties Due

*(Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code)*

Certificate Number: 21-08967

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: CECIL C. SEDBERRY

Social Security No.: 463-26-5192

Corporate No.:

Last Known Address: 3542 West 118th Place,
Inglewood, California 90303

For Taxable Years: 1967-06385333, 1968-02419042,
1969-02433976, 1970-02437998,
1971-02424545, 1972-025157171,
1973-025851312, 1974-7500470332

Tax \$2,322.20, Penalties \$1,170.94, Interest \$763.38,
Cost(s) \$6.00, Total \$4,262.52;

That further interest will accrue at the rate of six per cent per year until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned to execute this Certificate in its name.

Dated: May 12, 1975 FRANCHISE TAX BOARD of the State of California.

By /s/ J. G. A. Frimand
J. G. A. FRIMAND
TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy of the original document on file with the Franchise Tax Board.

Martin Huff, Executive Officer
By /s/ V. FORSCH

EXHIBIT I.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LA-C:HB:SDA

Certificate of Amount of Tax, Interest, and Penalties Due
*(Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code)*

Certificate Number: 21-11127

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: CECIL C. SEDBERRY and/or
HATTIE M. SEDBERRY

Social Security No: 463-26-5192 (II)

Corporate No.:

Last Known Address: 3542 West 118th Place,
Inglewood, California 90303

For Taxable Years: 1975-025146072; 1976--77-
26085141

Tax \$543.00, Penalties \$346.50, Interest \$91.61,
Cost(s) \$6.00, Total \$987.11

That further interest will accrue at the rate prescribed by law until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF; The Franchise Tax Board of the State of California has duly authorized the undersigned

—30—

to execute this Certificate in its name.

Dated: February 23, 1978 FRANCHISE TAX BOARD
of the State of California

By /s/ R. E. Bancroft
R. E. BANCROFT
TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy
of the original document on file with the Franchise Tax
Board.

Martin Huff, Executive Officer
By /s/ V. Forsch

EXHIBIT J.

ORDER TO WITHHOLD
PERSONAL INCOME TAX

PLEASE RETURN THIS COPY WITH A CHECK PAYABLE TO THE FRANCHISE TAX BOARD. IF NO MONEY IS DUE THE EMPLOYEE, PLEASE RETURN THE BLUE COPY.

[Letterhead]

State of California, Franchise Tax Board.

August 22, 1978

LA-C:MK:YA

Postmaster

Attn: Personnel Section

Los Angeles, CA 90052

Soc. Sec. No. 463-26-5192

Taxpayer: CECIL C. SEDBERRY

Account No.: 463-26-5192 SEDB

Total Due: \$5086.60

Year(s): 1974, 1975, 1976

THE FRANCHISE TAX BOARD of the State of California hereby notifies you that the total amount of tax, penalty, and interest was not paid when due and is now due, owing and unpaid as shown.

WHEREFORE, on behalf of the People of the State of California, you are required to deduct and withhold the above amount from any credits or payments of any nature due, owing and unpaid to the taxpayer and forward the amount to this office with a remittance made payable to the Franchise Tax Board attached to the original copy. If no money is due the employee, please complete the questionnaire on the blue copy and return it (Section 18817 of the Revenue and Taxation Code).

FAILURE TO WITHHOLD and remit the amount due to the Franchise Tax Board may make you liable for such

amount (Section 18818 of the Revenue and Taxation Code).

YOU ARE NOT LIABLE to the taxpayer for any amounts that you are required to withhold and pay to this Board (Section 18819 of the Revenue and Taxation Code).

Collection Section

IMPORTANT!

PLEASE GIVE THE COPY OF THIS ORDER TO THE TAXPAYER AS SOON AS POSSIBLE. The taxpayer should contact one of our offices immediately if this order should not be complied with.

EXHIBIT K.

[Letterhead]

United States Postal Service
WESTERN REGION
San Bruno, CA 94099

August 29, 1978

In reply refer to:

020:59-E-3:LTJ:j

State of California

Franchise Tax Board

Collection Section

3200 Wilshire Boulevard

Los Angeles, CA 90010

Re: Cecil C. Sedberry, SSN 463-26-5192

Gentlemen:

We are returning herewith the Order to Withhold Personal Income Tax which you forwarded to the Postmaster in Los Angeles. It is our understanding that your Headquarters office and the office of the State Attorney General agree that such orders are not applicable to federal agencies such as the United States Postal Service. If this understanding is not correct, please contact us further.

Yours very truly,

/s/ Lyman T. Johnston

Lyman T. Johnston

Regional Counsel

Enclosure

EXHIBIT L.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD

LA-C:KI:bl

Certificate of Amount of Tax, Interest, and Penalties Due

(*Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code*)

Certificate Number: 21-09161

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: JOSEPH STOVALL

Social Security No.: 352-28-4394

Corporate No.:

Last Known Address: 432 South Harvard Boulevard,
Los Angeles, California 90020

For Taxable Years: 1967-06425704 1969-02408543
1970-55128413 1971-02402873
1972-025087271 1973-025827102

Tax \$776.56, Penalties \$308.97, Interest \$161.54,
Cost(s) \$6.00, Total \$1,253.07;

That further interest will accrue at the rate of six per cent per year until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned

to execute this Certificate in its name.

Dated: July 22, 1975 FRANCHISE TAX BOARD of the
State of California.

By /s/ R. E. Bancroft

R. E. BANCROFT

TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy
of the original document on file with the Franchise Tax
Board.

Martin Huff, Executive Officer

by /s/ V. Forsch

EXHIBIT M.
ORDER TO WITHHOLD
PERSONAL INCOME TAX

PLEASE RETURN THIS COPY WITH A CHECK PAYABLE TO THE FRANCHISE TAX BOARD. IF NO MONEY IS DUE THE EMPLOYEE, PLEASE RETURN THE BLUE COPY.

[Letterhead]

State of California, Franchise Tax Board.

August 22, 1978

LA-C:MK:aep

Postmaster

Attn: Personnel

Los Angeles, CA 90052

Soc. Sec. No. 352-28-4394

Taxpayer: JOSEPH STOVALL

Account No: 352-28-4394STOV

Total Due: \$729.45

Year(s): 1971, 1972, 1973

THE FRANCHISE TAX BOARD of the State of California hereby notifies you that the total amount of tax, penalty, and interest was not paid when due and is now due, owing and unpaid as shown.

WHEREFORE, on behalf of the People of the State of California, you are required to deduct and withhold the above amount from any credits or payments of any nature due, owing and unpaid to the taxpayer and forward the amount to this office with a remittance made payable to the Franchise Tax Board attached to the original copy. If no money is due the employee, please complete the questionnaire on the blue copy and return it (Section 18817 of the Revenue and Taxation Code).

FAILURE TO WITHHOLD and remit the amount due to the Franchise Tax Board may make you liable for such

amount (Section 18818 of the Revenue and Taxation Code).

YOU ARE NOT LIABLE to the taxpayer for any amounts that you are required to withhold and pay to this Board (Section 18819 of the Revenue and Taxation Code).

Collection Section

IMPORTANT!

PLEASE GIVE THE COPY OF THIS ORDER TO THE TAXPAYER AS SOON AS POSSIBLE. The taxpayer should contact one of our offices immediately if this order should not be complied with.

EXHIBIT N.

[Letterhead]

United States Postal Service
WESTERN REGION
San Bruno, CA 94099

August 29, 1978

In reply refer to:

020:59-E-3:LTJ:j

State of California
Franchise Tax Board
Collection Section
3200 Wilshire Boulevard
Los Angeles, CA 90010

Re: Joseph Stovall, SSN 352-28-4394

Gentlemen:

We are returning herewith the Order to Withhold Personal Income Tax which you forwarded to the Postmaster in Los Angeles. It is our understanding that your Headquarters office and the office of the State Attorney General agree that such orders are not applicable to federal agencies such as the United States Postal Service. If this understanding is not correct, please contact us further.

Yours very truly,

/s/ Lyman T. Johnston
Lyman T. Johnston
Regional Counsel

Enclosure

EXHIBIT O.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LA-C:CG:LN

Certificate of Amount of Tax, Interest, and Penalties Due
*(Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code)*

Certificate Number: 21-04145

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: PAUL R. TALIAFERRO and/or
BARBARA J. TALIAFERRO

Social Security No: 561-26-7141 (H) 550-34-1080
(W)

Corporate No.:

Last Known Address: 316 North Savannah Street,
Los Angeles, California
90033

For Taxable Years: 1966-550800; 1967-06389616,
06389615; 1968-02437088,
02428880 1969-02428880,
02471206

Tax \$571.00, Penalties \$318.42, Interest \$161.83, Total
\$1,051.25;

That further interest will accrue at the rate of six per cent per year until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable

and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned to execute this Certificate in its name.

DATED: July 28, 1972 FRANCHISE TAX BOARD of the State of California

By /s/ S. Gordon

S. GORDON

TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy of the original document on file with the Franchise Tax Board.

Martin Huff, Executive Officer

By /s/ V. Forsch

EXHIBIT P.

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
LA-C:DC/IDS:SDA

Certificate of Amount of Tax, Interest, and Penalties Due
*(Filed Pursuant to Parts 10 and 11, Division 2,
Revenue and Taxation Code)*

Certificate Number: 21-08245

County Recorded in: LOS ANGELES

The Franchise Tax Board of the State of California hereby certifies that the following named taxpayer is liable under Parts 10 and 11 of Division 2 of the Revenue and Taxation Code to the State of California for amounts due and required to be paid by said taxpayer as follows:

Name of Taxpayer: B. J. TALIAFERRO AKA:
PAUL R. TALIAFERRO

Social Security No: 550-34-1080

Corporate No.:

Last Known Address: 316 North Savannah Street,
Los Angeles, California
90033

For Taxable Years: 1968-02428880; 1969-02471206;
1970-02475387; 1971-02458979

Tax \$689.00, Penalties \$344.50, Interest \$183.26,
Cost(s) \$6.00, Total \$1,222.76;

That further interest will accrue at the rate of six percent per year until paid; that the Franchise Tax Board of the State of California complied with all of the provisions of Parts 10 and 11 of Division 2 of the Revenue and Taxation Code of the State of California in computing, levying, determining and assessing the tax; that said amounts are due and payable and have not been paid.

IN WITNESS WHEREOF, The Franchise Tax Board of the State of California has duly authorized the undersigned

to execute this Certificate in its name.

Dated: September 10, 1974 FRANCHISE TAX BOARD
of the State of California

By /s/ J. G. A. Frimand

J. G. A. FRIMAND

TAX COMPLIANCE SUPERVISOR I

[SEAL]

This is to certify that this is a full, true and correct copy
of the original document on file with the Franchise Tax
Board.

Martin Huff, Executive Officer

By /s/ V. Frosch

EXHIBIT Q.
ORDER TO WITHHOLD
PERSONAL INCOME TAX

PLEASE RETURN THIS COPY WITH A CHECK PAYABLE TO THE FRANCHISE TAX BOARD. IF NO MONEY IS DUE THE EMPLOYEE, PLEASE RETURN THE BLUE COPY.

[Letterhead]

State of California, Franchise Tax Board.

August 14, 1978

LA-C:MK:YA

Postmaster

Attn: Personnel Section

Los Angeles, CA 90052

Soc. Sec. No. 561-26-7141

Taxpayer: PAUL R. TALIAFERRO

Account No.: 561-26-7141TALI

Total Due: \$1122.27

Year(s): 1966, 1968, 1969, 1970, 1974, 1975

THE FRANCHISE TAX BOARD of the State of California hereby notifies you that the total amount of tax, penalty, and interest was not paid when due and is now due, owing and unpaid as shown.

WHEREFORE, on behalf of the People of the State of California, you are required to deduct and withhold the above amount from any credits or payments of any nature due, owing and unpaid to the taxpayer and forward the amount to this office with a remittance made payable to the Franchise Tax Board attached to the original copy. If no money is due the employee, please complete the questionnaire on the blue copy and return it (Section 18817 of the Revenue and Taxation Code).

FAILURE TO WITHHOLD and remit the amount due to the Franchise Tax Board may make you liable for such

amount (Section 18818 of the Revenue and Taxation Code).

YOU ARE NOT LIABLE to the taxpayer for any amounts that you are required to withhold and pay to this Board (Section 18819 of the Revenue and Taxation Code).

Collection Section

IMPORTANT!

PLEASE GIVE THE COPY OF THIS ORDER TO THE TAXPAYER AS SOON AS POSSIBLE. The taxpayer should contact one of our offices immediately if this order should not be complied with.

Defendant's Answer to Plaintiff's Complaint.

United States District Court, Central District of California.
Franchise Tax Board, Plaintiff, v. United States Postal Service, Defendant. No. CV 78-4746-RF(PX).

Comes Now, the United States Postal Service, defendant, for its Answer, admits, denies, and avers as follows:

1. Admits the allegations in paragraph 1 of plaintiff's Complaint.

2. Paragraph 2 of plaintiff's Complaint contains jurisdictional allegations to which no answer is required, but insofar as an answer may be deemed to be required, the allegations are denied. However, defendant admits that the United States Postal Service is, and at all times material herein was, an establishment of the executive branch of the Government of the United States and doing business in Los Angeles County.

3. The allegation in paragraph 3 of plaintiff's Complaint contains a conclusion of law and not an allegation of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegation is denied.

4-5, inclusively. Admits the allegations contained in paragraphs 4 and 5 inclusively, of plaintiff's Complaint.

6-7, inclusively. Denies the allegations contained in paragraphs 6 and 7, inclusively, of plaintiff's Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8. Defendant admits that it was served with a purported "notice" on or about July 28, 1978. Plaintiff's allegation that the purported "notice" was served pursuant to section 18817 of the California Revenue and Taxation Code is a conclusion of law and not an allegation of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegation is denied.

9. Denies, except to the extent that the allegation contained in paragraph 9 of plaintiff's Complaint is borne out by Exhibit C to the Complaint which is the best evidence of its contents.

10. Admits the allegations contained in paragraph 10 of plaintiff's Complaint. For a full and complete statement of the Postal service response, the Court is respectfully referred to Exhibit D of the Complaint which is the best evidence of its contents.

11-12, inclusively. Paragraphs 11 and 12 of plaintiff's Complaint contain conclusions of law and not allegations of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegations are denied.

13. Defendant repeats its answers to paragraphs 1-4, respectively and inclusively, of plaintiff's Complaint.

14. Denies the allegations contained in paragraph 14 of plaintiff's Complaint.

15-16, inclusively. Denies the allegations contained in paragraphs 15 and 16, inclusively, of plaintiff's Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

17. Defendant admits that it was served with a purported "notice" on or about August 15, 1978. Plaintiff's allegation that the purported "notice" was served pursuant to section 18817 of the California Revenue and Taxation Code is a conclusion of law and not an allegation of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegation is denied.

18. Denies, except to the extent that the allegation contained in paragraph 18 of plaintiff's Complaint is borne out by Exhibit F to the complaint which is the best evidence of its contents.

19. Admits the allegations contained in paragraph 19 of plaintiff's Complaint. For a full and complete statement of the Postal Service response, the Court is respectfully referred to Exhibit G to the Complaint which is the best evidence of its contents.

20-21, inclusively. Paragraphs 20 and 21, inclusively, of plaintiff's Complaint contain conclusions of law and not allegations of fact to which an answer is required, but insofar as an answer is deemed to be required, the allegations are denied.

22. Defendant repeats its answers to paragraphs 1-4, respectively and inclusively, of plaintiff's Complaint.

23. Admits the allegations contained in paragraph 23 of plaintiff's Complaint.

24-25, inclusively. Denies the allegations contained in paragraphs 24-25, inclusively, of plaintiff's Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

26. Defendant admits that it was served with a purported "notice" on or about August 22, 1978. Plaintiff's allegation that the purported "notice" was served pursuant to section 18817 of the California Revenue and Taxation Code is a conclusion of law and not an allegation of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegation is denied.

27. Denies, except to the extent that the allegation contained in paragraph 27 of plaintiff's Complaint is borne out by Exhibit J to the Complaint which is the best evidence of its contents.

28. Admits the allegation contained in paragraph 28 of plaintiff's Complaint. For a full and complete statement of the Postal Service response, the Court is respectfully referred to Exhibit K to the Complaint which is the best

evidence of its contents.

29-30, inclusively. Paragraphs 29 and 30, inclusively, of plaintiff's Complaint contain conclusions of law and not allegations of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegations are denied.

31. Defendant repeats its answers to paragraphs 1-4, respectively and inclusively of plaintiff's Complaint.

32. Admits the allegations contained in paragraph 32 of plaintiff's Complaint.

33-34, inclusively. Denies the allegations contained in paragraphs 33 and 34, inclusively, of plaintiff's Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

35. Defendant admits that it was served with a purported "notice" on or about August 22, 1978. Plaintiff's allegation that the purported "notice" was served pursuant to section 18817 of the California Revenue and Taxation Code is a conclusion of law and not an allegation of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegation is denied.

36. Denies, except to the extent that the allegation contained in paragraph 36 of plaintiff's Complaint is borne out by Exhibit M to the Complaint which is the best evidence of its contents.

37. Admits the allegations contained in paragraph 37 of plaintiff's Complaint. For a full and complete statement of the Postal Service response, the Court is respectfully referred to Exhibit N to the Complaint which is the best evidence of its contents.

38-39, inclusively. Paragraphs 38 and 39, inclusively, of plaintiff's Complaint contain conclusions of law and not allegations of fact to which an answer is required, but insofar

as an answer may be deemed to be required, the allegations are denied.

40. Defendant denies each and every other allegation contained in plaintiff's Complaint not specifically admitted, denied, or otherwise qualified herein.

FIRST AFFIRMATIVE DEFENSE

41. As a first affirmative defense, defendant alleges that plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

42. As a second affirmative defense, defendant alleges that the Court lacks jurisdiction over this action.

THIRD AFFIRMATIVE DEFENSE

43. As a third affirmative defense, defendant alleges that plaintiff failed to exhaust its administrative remedies.

FOURTH AFFIRMATIVE DEFENSE

44. As a fourth affirmative defense, defendant alleges that the Court lacks jurisdiction in that the United States has not waived its immunity and has not consented to a suit of this nature.

FIFTH AFFIRMATIVE DEFENSE

45. As a fifth affirmative defense, defendant alleges that this action is barred by the Supremacy Clause of the United States Constitution, Article VI.

SIXTH AFFIRMATIVE DEFENSE

46. As a sixth affirmative defense, defendant alleges that plaintiff has breached its February, 1974, 5 U.S.C. §5517 contract with defendant.

SEVENTH AFFIRMATIVE DEFENSE

47. As a seventh affirmative defense, defendant alleges that plaintiff is estopped to deny that the action may not lie.

WHEREFORE, defendant prays that plaintiff's Complaint be dismissed and that such other and further relief as the Court deems just and proper be granted.

Dated: This 21st day of March, 1979.

Respectfully submitted,

/s/ Barbara Allen Babcock

BARBARA ALLEN BABCOCK

Assistant Attorney General

ANDREA SHERIDAN ORDIN

United States Attorney

LAWRENCE B. GOTLIEB

Assistant United States Attorney

/s/ David Epstein

DAVID EPSTEIN

/s/ Alfreda R. Bennett

ALFREDA R. BENNETT

Civil Division

Department of Justice

Washington, D.C. 20530

Telephone: (202) 724-7163

Attorneys for Defendant

OF COUNSEL:

CHARLES R. BRAUN

Assistant General Counsel

Special Projects Division

United States Postal Service

**Petition for Rehearing and Suggestion
That Rehearing Be En Banc.**

Nos. 80-5694 and 80-5700.

United States Court of Appeal for the Ninth Circuit.

Employment Development Department, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee.

Franchise Tax Board, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee.

Appeal from the United States District Court for the Central District of California.

Filed: February 24, 1983.

INTRODUCTORY STATEMENT

Appellant Franchise Tax Board ("the Board") petitions this Court for a rehearing en banc to reconsider the judgment entered in No. 80-5700 on February 10, 1983.

The majority Opinion of this Court has created an anomalous situation. Although private judgment creditors are permitted to garnish the wages of employees of appellee United States Postal Service ("the Postal Service") for payment of *any* debt owed by the employees, the Board is barred from garnishing those same wages of those *same* employees for payment of state income taxes. In light of the vital importance of the prompt collection of state taxes and the absence of any qualification upon the waiver of sovereign immunity of the Postal Service in 39 U.S.C. § 401 et seq., the majority opinion is difficult to reconcile.

In determining that 5 U.S.C. § 5517 prohibits the Board's garnishment under California Revenue and Taxation Code § 18817, the Board believes that the majority has either overlooked or misapprehended a number of facts.

1. Contrary to the discussion at page 11 of the majority Opinion, the Board's Order To Withhold ("OTW") pursuant to Cal. Rev. & Tax Code § 18817 does *not* deal with the same subject matter as 5 U.S.C. § 5517. The OTW pertains to the collection of *delinquent* tax liabilities. However, 5 U.S.C. § 5517 is only involved with *current* anticipated tax liabilities. The distinction between garnishments of wages to satisfy delinquent tax liabilities on the one hand and payroll withholding to satisfy current anticipated tax liabilities on the other, is crucial. While 5 U.S.C. § 5517 does not authorize garnishment of federal employees' wages for delinquent state tax debts, it does not prohibit such garnishment if permissible under other statutes (e.g., 39 U.S.C. § 401(1)).

2. Contrary to the majority Opinion at page 9 line 7, the State of California did not enter into an agreement as contemplated by 5 U.S.C. § 5517 on November 6, 1952. Rather, the agreement to which the majority refers was signed in February 1974. *See*, Excerpt pp. 134-136. The State of California did not even commence payroll withholding of California residents until January 1, 1972. *See*, Calif. Rev. and Tax. Code § 18806(a) (as it read before 1980 repeal and reenactment).

3. Consistent with 2 above, the majority Opinion has mistakenly concluded at page 9 lines 16-19 that the employees of the Post Office Department were subjected to payroll withholding in California. As the Postal Reorganization Act was enacted in 1970 - approximately four years prior to the commencement of payroll withholding in California - it would have been impossible for any employee of the Post Office Department to ever have had his or her wages withheld under California's payroll withholding law.

4. At page 11, lines 22-24 of the majority Opinion, the majority has mischaracterized the position of the Board.

The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has argued that 5 U.S.C. § 5517 only applies to current payroll withholding and by its terms does not prohibit wage garnishment for state taxes provided authority to do so exists under the provisions of other statutes. Two separate sovereign immunities are involved in 5 U.S.C. § 5517 and 39 U.S.C. § 401(1). Although the former is limited in scope in relation to the latter, their coexistence is quite compatible.

Finally, the Board believes this matter is appropriate for rehearing en banc. The exceptional importance of the collection of state taxes is not a matter which should be blithely cast aside. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means of collection of these liabilities must be preserved not only for California but also for any other state in which Postal employees reside.

ARGUMENT

I

WAGE GARNISHMENT AND PAYROLL WITHHOLDING DO NOT INVOLVE THE SAME SUBJECT MATTER

In reaching its conclusion that 5 U.S.C. § 5517 bars the Board's wage garnishments under Cal. Rev. & Tax Code § 18817, the majority has incorrectly stated that Sections 5517 and 18817 deal with the same subject matter. Section 5517 is only involved with payroll withholding of *current* anticipated tax liabilities. It neither prohibits nor permits wage garnishment of *delinquent* tax liabilities. Section 18817 is only involved with the collection of *delinquent* tax liabilities. The State of California has a full scheme of payroll withholding statutes patterned after the Internal Revenue

Code designed for the collection of *current* anticipated tax liabilities. Section 18817 is *not* part of that scheme.

The legislative history under 5 U.S.C. § 5517 is clear on the point that current payroll withholding akin to the income tax withholding provisions of the Internal Revenue Code (codified at 26 U.S.C. §§ 3401-3404) was the sole aim of the legislators. The following statement by Mr. Prouty, the representative from Vermont, is illustrative:¹

"The enactment of S. 1999 would accord to the States the same cooperation in tax collections which the Federal Government demands from them under 26 United States Code, pages 1622 to 1624 [now 26 U.S.C. §§ 3402-3404] and therefore increase the revenue of State governments, lessening their dependence on the Federal Government and strengthening our system of duality of sovereignty. (98 Cong. Record-House 9374 (1952).)

Furthermore, the legislative history indicates that Section 5517 was enacted because Congress believed that without the statute, because of sovereign immunity, federal agencies lacked authority to withhold state income taxes from the wages of their employees. *See*, 98 Cong. Record-House 9374 (1952); Sen. Rept. No. 1309 reprinted in 2 U.S. Code Congressional & Admin. News 2360 (1952); House Rept. No. 2474 reprinted in 2 U.S. Code Congressional & Admin. News 2434 (1952). As such, Section 5517 was a limited waiver of sovereign immunity for all federal agencies solely in the area of payroll withholding of current anticipated tax liabilities.

¹In 1952, only the States of Vermont and Oregon and the territories of Alaska and Hawaii had payroll withholding statutes to which the 5 U.S.C. § 5517 agreement would apply. *See*, Sen. Rept. No. 1309, reprinted in 2 U.S. Code Cong. & Admin. News 2361 (1952); House Rept. No. 2474, reprinted in U.S. Code Cong. & Admin. News 2434 (1952).

Payroll withholding under California law is a relatively recent phenomenon in that it was not until 1972 that it commenced with respect to California residents. Calif. Rev. & Tax Code § 18806 (as it read prior to 1980 repeal and reenactment). On the other hand, the Board's garnishment provisions under Section 18817 have been in existence for some forty years. Currently, payroll withholding is administered by the Employment Development Department and the pertinent statutes are now found in California Unemployment Insurance Code § 13000, et seq. Moreover, wage garnishments for taxes are now controlled by provisions of California Code of Civil Procedure § 723.070, et seq. That which the above plainly indicates is that the placement of the prior California payroll withholding provisions (Calif. Rev. & Tax. Code §§ 18805-18816) under the same Article and Chapter of the California Revenue and Taxation Code as the prior garnishment provisions of Calif. Rev. & Tax. Code §§ 18817-18819, simply does not mean that they involve the same subject matter.

To further demonstrate the diverse natures of payroll withholding and wage garnishment it should be noted that federal payroll withholding and federal wage garnishments for taxes do not appear in the same Subtitle much less same Chapter of the Internal Revenue Code. The payroll withholding provisions can be found at 26 U.S.C. § 3401, et seq. These provisions are located in Chapter 24 of Subtitle C of the Code. However, the Internal Revenue Service's wage garnishment provisions are found in Chapter 64 of Subtitle F at 26 U.S.C. § 6331, et seq. The California payroll withholding provisions were patterned after the Internal Revenue Code. See e.g., [old] Calif. Rev. & Tax Code § 18806 (now Calif. Unemp. Ins. Code §§ 13022-13029) which is substantially similar to 26 U.S.C. § 3402; [old] Calif. Rev. & Tax Code § 18807 (Calif. Unemp. Ins. Code 13009) -26

U.S.C. § 3401(a). Likewise, the Board's OTW provisions (Calif. Rev. & Tax. Code §§ 18817-18819) are quite similar to the Internal Revenue Service's wage garnishment provisions. *See*, Calif. Rev. & Tax. Code § 18817 (26 U.S.C. § 6331(a)(d)); § 18818 (26 U.S.C. § 6332(c)(1)); § 18819 (26 U.S.C. § 6332(a) & (d)).²

Furthermore, the general federal requirements for wage garnishments are under a completely different body of law - Title 15 U.S.C. - and are administered by the Department of Labor. California complies with the provisions of that law even in the area of tax collection. *See*, Calif. Code of Civil Procedure §§ 723.050, 723.074(b) (although exempted under 15 U.S.C. § 1673(b) California abides by the twenty-five percent maximum imposed on non-tax judgment creditors under 15 U.S.C. § 1673(a).) Moreover, whereas employees can adjust the amount of current taxes to be withheld under payroll withholding provisions by filing a withholding certificate ("W-4") claiming a different number of exemptions, no such right exists under wage garnishments.³

Plainly, the majority's analysis in attempting to find a conflict between 5 U.S.C. §§ 5517 and Calif. Rev. & Tax. Code § 18817 is faulty. Payroll withholding is not the same as wage garnishment. Section 5517 does not deal with wage garnishment nor does it purport to prohibit wage garnishment for federal employees where such is authorized under

²Both appellants noted the interrelationships and similarities between the federal and California statutes in Appellants' Opening Brief, pp. 38, 41-42.

³The "exemptions" which exist under wage garnishments for taxes (other than the 25 percent limitation of 15 U.S.C. § 1673) only include a "hardship exemption" (Calif. Code of Civil Procedure §§ 723.051, 723.075(c)). There is nothing analogous to withholding certificates for wage garnishments.

some other statute. Neither Section 5517 nor 31 CFR 215 goes that far. Rehearing should be granted to correct these errors.

II

THE STATE OF CALIFORNIA DID NOT ENTER INTO
THE SECTION 5517 AGREEMENT UNTIL 1974

The majority Opinion mistakenly states that the State of California entered into a Section 5517 payroll withholding agreement on November 6, 1952. *See*, Opinion, p. 9. The record indicates that the agreement to which the majority refers was executed in February 1974. *See*, Excerpt, pp. 134-136. Further, California did not even commence payroll withholding of California residents until January 1, 1972. *See*, Calif. Rev. & Tax. Code § 18806. As the majority's entire analysis flows from this misconception, rehearing should be granted to rectify this error.

III

NO EMPLOYEES OF THE POST OFFICE DEPARTMENT WERE EVER SUBJECT TO PAYROLL WITHHOLDING

The enactment of the Postal Reorganization Act in 1970 antedated both the execution of the Section 5517 agreement by the State of California in 1974, and the commencement of payroll withholding in California in 1972. Therefore, contrary to the majority's statement at page 9 of the Opinion, *no* Post Office Department employees ever could have been subject to California payroll withholding. Accordingly, as with Argument II above, since the majority's analysis is founded upon a misapprehension of the facts rehearing would appear to be appropriate to correct this error.

IV

5 U.S.C. § 5517 ONLY APPLIES TO CURRENT PAY-
ROLL WITHHOLDING AND DOES NOT PRO-
HIBIT WAGE GARNISHMENT FOR TAXES OF
POSTAL EMPLOYEES WHERE AUTHORITY TO
DO SO EXISTS UNDER 39 U.S.C. § 401(1)

At page 11 of the majority Opinion the position of the Board has been mischaracterized. The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has pointed out that the sovereign immunity which was limitedly waived in 5 U.S.C. § 5517 applied to *all* federal agencies and pertained only to current payroll withholding of state taxes for those agencies. However, the sovereign immunity which was waived in 39 U.S.C. § 401(1) is a *general* waiver of sovereign immunity which applies only to the Postal Service. This general waiver has been interpreted by this Court and Circuit Courts in at least seven of the Circuits as permitting garnishment of Postal employees' wages. There is no qualification on this waiver of sovereign immunity. Moreover, there is no qualification or limitation on the type of debts which can be garnished from Postal employees' wages.⁴ Logically speaking, there is no reason to treat Postal employees' commercial debts any differently than their tax debts. Indeed, the majority Opinion

⁴Compare 38 U.S.C. § 1820(a)(1) which includes a "sue and be sued" clause applicable to the Veteran's Administration. Following a district court decision upholding wage garnishments under that statute against VA employees, the statute was amended to "qualify" the "sue and be sued" clause explicitly stating that wage garnishments were not permitted under the authority of that statute. See, *May Dept. Stores Co. v. Smith* (8th Cir. 1978) 572 F.2d 1275.

Obviously, if a qualification of the Postal Service's sue and be sued clause was intended for tax debts, Congress could have so amended 39 U.S.C. § 401(1).

has placed these tax debts on a lower plane than commercial debts which is completely contrary to long established authority.

The State of California has a vital interest in collecting taxes from its taxpayers. This vital interest which is shared by all other states and taxing authorities was recognized long ago by the United States Supreme Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. The Supreme Court decided that no court could enjoin the collection of the tax, and stated as follows:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." (*Dows, supra*, 78 U.S. at 110.)

The Supreme Court also stated that "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government." (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 261; Accord *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

In all, the anomalous situation which the majority Opinion has created is simply unsupported by the record and the law. 5 U.S.C. § 5517 and 39 U.S.C. § 401(1) can peace-

fully coexist.⁵ Wage garnishments for state tax debts of Postal employees simply do not run afoul of Section 5517 because they are authorized by 39 U.S.C. § 401(1). Rehearing is absolutely necessary to correct this anomalous situation.

SUGGESTION THAT REHEARING BE EN BANC

The Board respectfully suggests that a rehearing of No. 80-5700 en banc is appropriate for the following reasons:

1. The collection of state taxes is a matter of extreme importance. Before an infringement upon the vital right may be permitted it must be clearly demonstrated that indeed a federal statute such as 5 U.S.C. § 5517 was intended to expressly *limit* that right. However, in this instance, Section 5517 was not intended to limit the collection of state taxes, rather to facilitate that collection through payroll withholding. Contrary to the majority Opinion, Section 5517 was not intended to restrict the collection of delinquent state tax liabilities where such collection is authorized under the provisions of another Act of Congress such as 39 U.S.C. § 401(1).

2. The majority Opinion has created an anomalous situation where tax debts of Postal employees are being placed

⁵Compare an analogous situation where the Postal Service argued unsuccessfully that 42 U.S.C. § 659 (statute authorizing wage garnishment for alimony and child support debts for all federal employees) barred garnishment of Postal employees' wages for commercial debts. In *Iowa-DesMoines National Bank v. U.S.* (S.D. Iowa, 1976) 414 F.Supp. 1393 the Court held that since the Postal Service had already consented to "sue and be sued," in 39 U.S.C. § 401(1), the consent of the United States in 42 U.S.C. § 659 (for alimony and child support debts) is *superfluous* insofar as garnishments against the Postal Service are concerned.

Similarly, 5 U.S.C. § 5517 may well be *superfluous* insofar as the Postal Service is concerned since all that statute is imposing upon the Postal Service is the duties and responsibilities required of any private employer. The same can be said for Calif. Rev. & Tax. Code § 18817.

on a *lower* plane than commercial debts. This is completely unwarranted and in fact conflicts with longstanding authority regarding the preeminence of tax debts.

3. The majority Opinion has disregarded the Postal Service's concession that garnishment of Postal employees' wages was permissible, even in light of their Section 5517 argument, if the Board obtained a court judgment for taxes.

4. Finally, as Postal employees reside and are required to pay state and local taxes not only in California but also in virtually all of the States, the problem of how to collect these delinquent liabilities is not exclusive to California.

CONCLUSION

Based upon the foregoing, the Board respectfully requests that this Court grant a rehearing en banc.

DATED: February 23, 1983.

Respectfully submitted,

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Order.

Supreme Court of the United States.

No. 83-372.

Franchise Tax Board of California, Appellant, v. United States Postal Service.

APPEAL from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 9, 1984.

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No. 83-372

Office - Supreme Court, U.S.
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ALEXANDER L STEVENS

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

v.

UNITED STATES POSTAL SERVICE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether a state agency may require the Postal Service to withhold sums from the wages of its employees to pay the employees' delinquent tax liabilities, when federal statutes providing for the enforcement of levies by state agencies permit the withholding only of anticipated tax liabilities.

(I)

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-372

FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

v.

UNITED STATES POSTAL SERVICE

*ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT*

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, moves that the appeal be dismissed or, in the alternative, that the judgment of the court of appeals be affirmed.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 698 F.2d 1029.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 (Pet. App. 1). A petition for rehearing was denied on June 3, 1983 (Pet. App. 26). A notice of appeal was filed on August 12, 1983 (Pet. App. 27). The Jurisdictional Statement was filed on August 31, 1983. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss this Court's jurisdiction at pages 7-8, *infra*.

STATEMENT

Appellant is an agency of the California state government. Under Cal. Rev. & Tax. Code § 18817 (West 1983), appellant may "require any employer * * * having in [its] possession, or under [its] control, any credits or other personal property or other things of value, belonging to a taxpayer * * * to withhold * * * the amount of any tax, interest, or penalties due from the taxpayer * * * and to transmit the amount withheld to" appellant. In 1978, appellant sought to collect delinquent personal income taxes from four Postal Service employees by serving "orders to withhold," pursuant to Section 18817, on the Postal Service. When the Postal Service declined to withhold the amounts sought by appellant from the employees' wages, appellant brought this action in the United States District Court for the Central District of California, seeking the amounts in issue. J.S. App. 7-8, 20-21.

The district court granted summary judgment in favor of the Postal Service.¹ It based its ruling primarily on 5 U.S.C. 5517. Section 5517 specifies that when a state statute provides for taxes to be collected by withholding from employees' pay, the federal government shall, upon request by the state, "enter into an agreement with the State * * * [which] agreement shall provide that the head of each agency * * * shall comply with the requirements of the State

¹This action was consolidated with a suit against the Postal Service brought by another California state agency, the Employment Development Department, which sought to recover unemployment insurance taxes allegedly owed by contractors that had done work for the Postal Service. The district court ruled in favor of the Postal Service (J.S. App. 23-24), but the court of appeals reversed (*id.* at 2-7), and we have not sought further review.

withholding statute in the case of employees of the agency who are subject to the [state] tax * * *." The district court noted that the agreement between California and the federal government provided only for the withholding of anticipated taxes and "does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever" (J.S. App. 23).

The court of appeals affirmed. It ruled that while Cal. Rev. & Tax. Code § 18817 can reach federal agencies, 5 U.S.C. 5517 "excused" the Postal Service from honoring appellant's orders to withhold because the agreement between California and the federal government "specifically states: '3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of federal employees'" (J.S. App. 9-10). The court also noted that regulations implementing Section 5517 contain a similar limitation (J.S. App. 10, citing 31 C.F.R. 215.12(a)). The court accordingly held (J.S. App. 13):

In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The court of appeals also rejected appellant's arguments that Section 5517 is no longer applicable to the Postal Service (J.S. App. 11-12), and that 39 U.S.C. 401(1), which provides that the Postal Service may "sue and be sued in its official name," authorized appellant's order to withhold (J.S. App. 13). Judge Schroeder dissented, reasoning that "[t]he federal courts have consistently held that [39 U.S.C.]

401(1) waives Postal Service immunity from state garnishment proceedings" and "[t]he statutory collection process in question here is essentially a garnishment procedure" (J.S. App. 15-16).

ARGUMENT

1. Appellant does not dispute the settled principle that a government agency cannot be subject to garnishment, attachments, or similar process — such as appellant's orders to withhold—unless Congress has waived the agency's immunity from suit. See *FHA v. Burr*, 309 U.S. 242, 244 (1940); *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846). But appellant contends (e.g., J.S. 8, 10, 23-24) that 39 U.S.C. 401(1), which states that the Postal Service may sue and be sued, is a waiver of sovereign immunity that permits the Postal Service to be served with appellant's orders to withhold. In support of this contention, appellant cites several court of appeals decisions that, appellant asserts, hold that Section 401(1) waives the Postal Service's immunity from post-judgment garnishments; appellant also notes, correctly, that the Postal Service will honor post-judgment garnishments (see, e.g., J.S. 8, 10-12, 16, 22-23).

Garnishments issued in aid of a law suit, however, are crucially different from appellant's orders to withhold. In *FHA v. Burr*, *supra*, which held that a statute providing that a federal agency may "sue and be sued" waived that agency's immunity from a garnishment issued to execute a final judgment, this Court explained (309 U.S. at 245-246 (footnotes omitted)): "[T]he words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. * * * To say that Congress did not intend to include

such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." See also *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85 (1941) ("[T]he words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings.").

In short, the Court interpreted the "sue and be sued" clause to permit post-judgment garnishments because garnishments are an incident of litigation. But appellant's orders to withhold have no such nexus to litigation. They are not "incident to the commencement or continuance of legal proceedings"; nor are they a "natural and appropriate incident[] of legal proceedings." They are issued by an administrative body, not a court. They are issued on the basis of an administrative — not a judicial — determination of liability. An order to withhold is, it appears, final agency action that will give rise to litigation only if another party seeks to challenge it. Its purpose is to facilitate the collection of taxes by an administrative agency, not to execute the judgment of a court or to give a court the opportunity to exercise its jurisdiction.

In all of these respects, appellant's "orders to withhold" resemble not garnishments but state requirements that anticipated tax liabilities be withheld. For that reason, the court of appeals was correct in concluding that 5 U.S.C. 5517 — which deals with agency orders designed to facilitate the administrative collection of taxes — rather than 39 U.S.C. 401(1) — which deals with judicial process — governs appellant's orders to withhold.

As both courts below ruled, the interpretation of Section 5517 is not in doubt. The State explicitly agreed with the federal government that Section 5517 does not authorize it to issue orders to withhold sums due if the purpose of those orders is to collect delinquent taxes. Since Section 5517 is the relevant waiver of sovereign immunity, and it does not

authorize appellant's orders to withhold, it follows that appellant may not enforce its orders to withhold against the Postal Service.

The unadjudicated delinquent tax liabilities that appellant seeks to collect will often be disputed by the taxpayer. It can be expected that Postal Service employees would frequently insist that appellant has calculated their tax delinquencies incorrectly, or that they are not liable for delinquent taxes at all. By contrast, the amounts that are to be withheld for anticipated tax liabilities, and the amount of a judgment entered by a court and enforced by garnishment, will seldom be in serious dispute. It was entirely reasonable for Congress to decide not to embroil government agencies in the disputes that inevitably will occur when states seek to collect delinquent taxes by administrative order, while authorizing federal agencies to withhold the generally uncontroversial sums involved in anticipated tax liabilities and the enforcement of judgments entered by courts.

For these reasons, the judgment of the court of appeals should be affirmed.²

²Appellant asserts (J.S. 10-11) that other Ninth Circuit decisions have treated its orders to withhold as the equivalent of post-judgment garnishment. But the case cited by appellant — *Randall v. Franchise Tax Board*, 453 F.2d 381 (9th Cir. 1971) —merely ruled that an order to withhold was lawful under the Due Process Clause for some of the same reasons that a garnishment is lawful under that Clause (see 453 F.2d at 382). That ruling sheds no light on the question in this case, which concerns not the Due Process Clause but the interpretation of statutes waiving sovereign immunity.

Appellant also suggests (J.S. 13) that 5 U.S.C. 5517 may no longer apply to the Postal Service. This contention was answered by the court of appeals (J.S. App. 11-12). Indeed, the court of appeals noted that the Postal Service continues to withhold —for the benefit of the State—anticipated state taxes from its employees under the regulations and agreements issued pursuant to Section 5517. If an employee were to challenge the Postal Service's authority to withhold such taxes, we expect the State would vigorously contend that the regime established under Section 5517 does continue to apply to the Postal Service.

2. This case is not within this Court's appellate jurisdiction. Appellant relies on 28 U.S.C. 1254(2), which gives the Court jurisdiction over an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States * * *." The court of appeals' holding, however, is best interpreted not as a ruling that Cal. Rev. & Tax. Code § 18817 is unconstitutional but as a ruling that that statute, as interpreted by the State, does not authorize the issuance to the Postal Service of withholding orders designed to collect delinquent taxes. See generally *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2) is to be narrowly construed).

The court of appeals never stated that the California statute was preempted by 5 U.S.C. 5517 or is otherwise unconstitutional. Instead, the court of appeals relied heavily on the agreement between state and federal authorities that implemented Section 5517. That agreement reflects an understanding — shared by both state and federal officials — that a state statutory collection scheme for delinquent taxes that requires withholding from employees' pay does not apply to federal employees. As the court of appeals noted, this interpretation of state law is not compelled by the language of Section 18817. But it is the interpretation to which state officials agreed, and the court of appeals did no more than require state officials to adhere to their own interpretation of the state statute. In fact, even in the Jurisdictional Statement the State has not repudiated the interpretation embodied in its agreement with the federal government (see J.S. 11).

Indeed, Section 5517 specifies that the agreement adopted by state and federal officials pursuant to that statute "shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding

statute * * *. "The agreement must, therefore, be regarded as embodying an agreed-upon interpretation of the requirements of state withholding statutes. It would be peculiar to say that Section 5517, which explicitly enjoins federal officials to comply with state statutory requirements, has preempted a state statute.

3. If appellant's Jurisdictional Statement is considered a petition for a writ of certiorari (see 28 U.S.C. 2103), it should be denied. Appellant does not identify any conflict among the circuits.³ Appellant asserts, as we noted, that the court of appeals' decision is inconsistent with decisions holding that judicial garnishment orders may be served on the Postal Service. But we have explained (pages 4-6, *supra*) why there is no inconsistency; garnishments ancillary to judicial process are different in significant respects from administrative levies. Moreover, since the Postal Service will honor a garnishment order obtained by appellant after it reduces a tax debt to judgment, the practical significance of the court of appeals' decision is limited.

³Indeed, the United States District Court for the Eastern District of Michigan recently followed the court of appeals' decision in this case and held that the Postal Service is not amenable to a Michigan tax collection procedure similar to appellant's. *Michigan Department of Treasury v. United States Postal Service*, Civil No. 82-71085 (Sept. 28, 1983).

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the Jurisdictional Statement is treated as a petition for a writ of certiorari, the Petition should be denied. Alternatively, the judgment of the court of appeals should be affirmed.

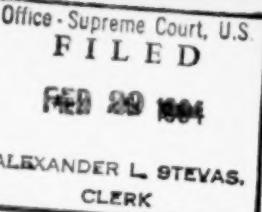
Respectfully submitted.

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DECEMBER 1983



No. 83-372
IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,
vs.
UNITED STATES POSTAL SERVICE,
Appellee.

On Appeal From the United States
Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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State of California.

Questions Presented.

1. Was the Franchise Tax Board of the State of California prohibited by the doctrine of pre-emption from using its tax levy to garnish the wages of Postal Service employees to collect delinquent income taxes notwithstanding the fact that:

- a. At least seven separate Circuit Courts of Appeal have held that ordinary judgment creditors may garnish the wages of these same Postal Service employees.
- b. The California statute which authorized said collection (California Revenue and Taxation Code § 18817) pertained only to the collection of delinquent income taxes and thus could not conflict with 5 U.S.C. § 5517 which deals with a totally separate area, to wit, the withholding of current anticipated tax liabilities.

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The United States Postal Service.

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No. 83-372

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES POSTAL SERVICE,

Appellee.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Ninth Circuit, filed on February 10, 1983, is reported at 698 F.2d 1029 and is reproduced at A. 1 - A. 16 of the Franchise Tax Board's Jurisdictional Statement.¹ The Court of Appeals' Order Amending Opinion and Denying Rehearing was filed on June 3, 1983, and is reproduced at A. 26. The Judgment of the United States District Court for the Central District of California was filed on July 7, 1980, and is reproduced at A. 17-18. The Findings of Fact and Conclusions of Law for the United States District Court for the Central District of California were filed on August 6, 1980 and are reproduced at A. 19-25.

¹Citations in the form "A. . . ." are to the Appendix to the Jurisdictional Statement filed by the Franchise Tax Board and in the form "J.A. . . ." to the Joint Appendix.

Jurisdiction.

This suit was brought in District Court by the Franchise Tax Board (the "Board"). (J.A. 8-44.) The District Court granted judgment for the United States Postal Service (the "Postal Service"). (A. 17-18.) The Board appealed to the Court of Appeals for the Ninth Circuit. The Opinion of the Court of Appeals affirming the judgment granted by the District Court was filed on February 10, 1983. (A. 1-16.) A timely Petition for Rehearing And Suggestion That Rehearing Be En Banc was filed on February 24, 1983. (J.A. 51-61.) The Petition for Rehearing was denied on June 3, 1983. (A. 26.)

The Board filed a Notice of Appeal to the Supreme Court of the United States from the opinion on August 12, 1983, with the clerk, United States Court of Appeals for the Ninth Circuit. (A. 27.) This appeal was docketed on August 31, 1983. On January 9, 1984, this Court noted probable jurisdiction. (J.A. 62.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code § 18817 was preempted by 5 U.S.C. § 5517 insofar as it allowed the Franchise Tax Board to garnish the wages of United States Postal Service employees.

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

"The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the

amount withheld to the Franchise Tax Board at such times as it may designate."

California Revenue and Taxation Code section 18818 provides as follows:

"Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts."

39 U.S.C. § 401 provides in pertinent part:

"The Postal Service shall have the following general powers:

"(1) to sue and be sued in its official name; . . ."

39 U.S.C. § 410 provides in pertinent part:

"(a) Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, . . . employees, . . . shall apply to the exercise of the powers of the Postal Service. . . ."

5 U.S.C. § 5517 provides in pertinent part:

Withholding State income taxes

"(a) When a State statute —

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State with-

holding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made . . .

“(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section . . .”

31 C.F.R. § 215.12 provides in pertinent part:

“Nothing in this agreement shall be deemed:

(a) To require collection by agencies of the United States of delinquent tax liabilities of Federal employees or members of the Armed Forces, or

(b) To consent to the application of any provision of law of the State, city or county which has the effect of:

(1) Imposing more burdensome requirements upon the United States than it imposes on other employers, or

(2) subjecting the United States or any of its officers or employees to a penalty or liability. . . .”

Statement of the Case.

The Franchise Tax Board is the agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California.

During July and August 1978, the Franchise Tax Board issued to the Postal Service four Orders to Withhold pursuant to § 18817 of the California Revenue and Taxation Code attempting to garnish wages of four of its tax debtors who were employed by the Postal Service. (J.A. 19, 24, 31, 36, 45-48.) The Postal Service refused to honor the Franchise Tax Board’s Orders, contending instead that any funds owed to the tax debtors-employees were not subject to the Franchise Tax Board’s Order to Withhold. (J.A. 21, 26, 33, 38, 46-48.)

On December 13, 1978, the Franchise Tax Board filed a complaint against the Postal Service for failure to deliver per-

sonal property levied upon. (J.A. 8-44.) The Franchise Tax Board sought to recover the amount owed by the Postal Service to each of the four tax debtors at the time of the service of the respective Orders to Withhold (hereinafter sometimes referred to as wage garnishments) up to the amount of delinquent taxes owed to the Franchise Tax Board. *Id.*

On March 23, 1979, the Postal Service filed its Answer. (J.A. 45-50.)

In a companion case the Employment Development Department filed a complaint to enforce a levy upon the accounts receivable owed by the Postal Service to two mail transportation contractors who were delinquent in paying their unemployment insurance taxes. (A. 2.)

The actions were consolidated. (Clerk's Record (CR), Document No. 12.)

The Franchise Tax Board and the Employment Development Department filed motions for summary judgment. (CR, Document No. 18.) The Postal Service filed a motion for judgment on the pleadings or in the alternative for summary judgment. (CR, Document No. 19.)

On July 7, 1980, Judgment was entered in favor of the Postal Service and against the Franchise Tax Board and the Employment Development Department dismissing the actions. (A. 17-18.) On August 6, 1980, Findings of Fact and Conclusions of Law were filed by the Court. (A. 19-25.)

On September 2, 1980, the Employment Development Department filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. (CR, Document No. 29.) On September 3, 1980, the Franchise Tax Board filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. (CR, Document No. 20.)

On February 10, 1983, the Court of Appeals for the Ninth Circuit filed an opinion (one judge dissenting in part) affirming in part and reversing in part the judgment of the United States District Court. (A. 1-16.) Specifically, the Court of Appeals reversed the summary judgment of the United States District Court granted against the Employment Development Depart-

ment and in favor of the U.S. Postal Service, and affirmed the summary judgment of the United States District Court granted against the Franchise Tax Board and in favor of the U.S. Postal Service. The dissenting Judge agreed with the majority opinion which reversed the summary judgment against the Employment Development Department but dissented from the majority opinion which affirmed the summary judgment against the Franchise Tax Board. (A. 15-16.)

A Petition For Rehearing And Suggestion That Rehearing Be En Banc was timely filed by the Franchise Tax Board only. (J.A. 51-61.) The Court of Appeals issued an Order Amending Opinion and Denying Rehearing on June 3, 1983. (A. 26.)

With regard to the Franchise Tax Board case, the Ninth Circuit Majority Opinion found that the Franchise Tax Board levies were prohibited by 5 U.S.C. § 5517 and apparently also by 31 C.F.R. § 215.12(a). (*Employment Development Department v. U.S. Postal Service* (1983) 698 F.2d 1029, 1035-1036.) (A. 9-13.)

The dissenting Judge in the Ninth Circuit Opinion below stated that 5 U.S.C. § 5517 was a limited waiver of sovereign immunity but that the Postal Reorganization Act waived Postal Service immunity without any qualification regarding state tax procedures. The dissenting Judge pointed out that the federal courts have consistently held that 39 U.S.C. § 401(1) waives Postal Service immunity from state garnishment proceedings. The Judge concluded that the Franchise Tax Board's tax levy was essentially a garnishment procedure and he could see no reason why Congress would want to treat the Postal Service employees' tax debts any differently than it treats their other debts. *Employment Development Department v. U.S. Postal Service (supra)* 698 F.2d 1029, 1037-1038. (A. 15-16.)

With regard to the Employment Development Department case, the Ninth Circuit Majority Opinion found the Employment Development Department's administrative tax levy should be honored. It found that the levy statute was not inconsistent with and therefore not preempted by 39 U.S.C. § 5006. The Court pointed out that 39 U.S.C. § 5006 was not the exclusive

method of attaching Postal Service funds owed to contractors or subcontractors and that other Circuit Courts had allowed garnishment of Postal Service funds without regard to whether the debt garnished was owed to a contractor or subcontractor. *Employment Development Dept. v. U.S. Postal Service, supra*, 698 F.2d 1029, 1033-1034. (A. 6-7.)

The Board filed a Notice of Appeal to the Supreme Court of the United States with regard to that portion of the Ninth Circuit Opinion dealing with the Franchise Tax Board's levy statute. (A. 27.) The Postal Service did not seek further review from this Court with regard to the Employment Development Department portion of the Opinion.

SUMMARY OF ARGUMENT.

The Postal Service may sue and be sued. Congress has not given it any sovereign immunity and/or Congress has waived its sovereign immunity. Waivers of governmental immunity from suit should be liberally construed. The doctrine of sovereign immunity is not favored.

Seven separate Circuits have held that ordinary judgment creditors of Postal Service employees may garnish their wages. The Ninth Circuit is the first Circuit to prohibit a garnishment of Postal Service employees' wages.

Over forty-five years ago, this Court set out the principles with regard to the creation and/or waiver of sovereign immunity.

F.H.A. v. Burr (1940) 309 U.S. 242 held that a judgment creditor could garnish the wages of an F.H.A. employee and that when Congress launches a governmental entity into the commercial world and endows it with authority to "sue and be sued," that agency it just as amenable to judicial process as private enterprise under the same circumstances.

When this Court has discussed whether a governmental agency is amenable to a particular incident of suit, e.g., garnishment, the payment of costs, there has been an emphasis on the fact that the agency is engaging in business transactions with the public and it has been launched into the commercial world.

It is clear that the Postal Service has been launched into the commercial world. Congress intended to establish the Postal Service as an efficient, self-sustaining entity. The Postal Service is now akin to any other employer in the commercial world. Thus, it is not inconsistent with the new statutory scheme and with the intent of Congress to allow the Board to levy on wages of Postal Service employees, and if the Postal Service refuses to honor such levy, it should be liable for the consequences of its refusal.

Congress did not intend the Postal Service's "sue and be sued" clause to be interpreted narrowly. Congress did not intend to exclude garnishment from the "sue and be sued" clause because the Postal Reorganization Act is silent as to garnishment. Where Congress has intended to exclude garnishment from a waiver of sovereign immunity, it has done so specifically.

California's levy statute was not preempted by 5 U.S.C. § 5517. In the absence of a federal statute which explicitly prohibits garnishment of Postal Service employees for state tax debts, California must be allowed to utilize its tax levy.

5 U.S.C. § 5517 was enacted in order for the federal government to *cooperate* with state wage withholding programs with regard to federal employees. Congress could not have intended the same statute to preclude a State from collecting delinquent taxes.

Wage garnishment of delinquent tax liabilities and payroll withholding of current anticipated tax liabilities do not involve the same subject matter. Payroll withholding was not begun until 1972 in California while garnishment provisions for delinquent tax liabilities have existed for over forty years. The present California withholding statutes are found in the California Unemployment Insurance Code and the wage garnishment statutes are found in the California Code of Civil Procedure. This demonstrates that the tax levy and withholding statutes do not concern the same subject matter.

There is no conflict between 5 U.S.C. § 5517 and the Board's levy statute. The Board does not impose more burdensome

requirements on the United States than on other employers. No liability is being asserted against the Postal Service *because* of 5 U.S.C. § 5517. The Board is not suing under § 5517. It is suing under its own statute, Revenue and Taxation Code § 18817. The Board is not requiring the Postal Service to collect delinquent taxes under the authority of § 5517.

Two separate sovereign immunities are involved in this case. 5 U.S.C. § 5517 is a limited waiver of sovereign immunity which applies to *all* federal agencies wherein the federal government cooperates with States by withholding current anticipated tax liabilities. 39 U.S.C. § 401(1) is a general waiver of sovereign immunity which applies only to the Postal Service.

A tax may be self-determined by the taxpayer or assessed by the Franchise Tax Board. Where it is assessed by the Franchise Tax Board, the taxpayer has numerous opportunities to protest the assessment before he has to pay and even after he pays, he may bring a suit for refund in the Superior Court.

The Board may institute tax collection proceedings without obtaining a state court judgment. When an assessment becomes final, the Board is then analogous to a judgment creditor and the tax levy is like a judgment creditor's garnishment.

Summary administrative proceedings to collect taxes have been upheld by this Court. No "judgment" is necessary. A tax assessment is given the force of a judgment and if the amount is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

Ordinary employers must honor tax levies from the Board. The Postal Service is similar to other employers in business and must also honor the tax levy. If the Postal Service failed to honor a wage garnishment from an ordinary judgment creditor, the creditor could institute legal action against the Postal Service. If the Postal Service refuses to honor the Board's levy, the consequences should be no different.

It is the policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. The salaries of employees of the Federal Government are not immune from tax. Congress consented to the levy and collection of various taxes from federal employees in federal areas.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

A majority of the Ninth Circuit panel below has held that California's income tax levy statute, Revenue and Taxation Code § 18817 is preempted by 5 U.S.C. § 5517 and thus California is prohibited from garnishing the wages of United States Postal Service employees to collect delinquent taxes.² This conclusion was reached even though the Postal Service honors wage garnishments from ordinary judgment creditors.

The Ninth Circuit panel has erroneously stated that Revenue and Taxation Code § 18817 and 5 U.S.C. § 5517 deal with the same subject matter. Specifically, the Ninth Circuit has held that Revenue and Taxation Code § 18817 which deals with the collection of *delinquent* state income taxes has been preempted by 5 U.S.C. § 5517 which deals only with withholding of current anticipated tax liabilities.

The distinction between garnishment of wages to satisfy delinquent tax liabilities on the one hand and payroll withholding to satisfy current anticipated tax liabilities on the other, is crucial. While 5 U.S.C. § 5517 does not *authorize* garnishment of federal employees' wages for delinquent state tax debts, it does not *prohibit* such garnishment if permissible under other statutes (e.g., 39 U.S.C. § 401(1)).

5 U.S.C. § 5517 provides that the Secretary of the Treasury will enter into a contract with States which want federal agen-

²Prior to 1980 and during the period relevant to this proceeding, California Revenue and Taxation Code § 18817 authorized the Order to Withhold which was used to garnish wages and/or levy on personal property which belonged to a delinquent taxpayer. Since 1980, administrative tax levies on wages, called Earnings Withholding Orders for Taxes, have been governed by California Code of Civil Procedure §§ 723.070, *et seq.*, operative January 1, 1980, and succeeded by California Code of Civil Procedure §§ 706.070, *et seq.*, operative July 1, 1983. Revenue and Taxation Code §§ 18817, *et seq.*, still apply to levies on personal property other than wages. Earnings Withholding Order for Taxes are essentially the same as the previous Order to Withhold in that they are both administrative tax levies and the order may be issued whether or not the state tax liability has been reduced to judgment. Code of Civil Procedure § 706.072.

cies and instrumentalities to withhold estimated state tax liabilities from the wages of federal employees. This is a limited waiver of sovereign immunity for all federal agencies.

By contrast, 39 U.S.C. § 401(1) is a *general* waiver of immunity for the Postal Service only. Pursuant to this section, the Board may require the Postal Service to honor a wage garnishment for delinquent taxes.

The important consideration here is that the Board's wage garnishment statute cannot conflict with 5 U.S.C. § 5517 because the Board is relying on 39 U.S.C. § 401(1), not 5 U.S.C. § 5517, to require the Postal Service to honor its garnishment.

It is at this point that the nature of the Postal Service must be emphasized. It has been unanimously held by every federal court of appeal which has considered the issue, that the Postal Service's sovereign immunity was generally waived by the Postal Reorganization Act of 1970. See, e.g., *Beneficial Finance Co. of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-8. Therefore, unlike other federal agencies which may have retained their sovereign immunity (other than that which was waived by 5 U.S.C. § 5517), the Postal Service is amenable to the use of all state tax collection devices.³

5 U.S.C. § 5517 was enacted in order for the federal government to *cooperate* with state wage withholding programs with regard to federal employees. It is not logical to conclude that Congress would also intend that 5 U.S.C. § 5517 could be used to prohibit states from collecting delinquent taxes from Postal Service employees.

³Compare an analogous situation where the Postal Service argued unsuccessfully that 42 U.S.C. § 659 (statute authorizing wage garnishment for alimony and child support debts for all federal employees) barred garnishment of Postal employees' wages for commercial debts. In *Iowa-Des Moines Nat. Bank v. United States* (S.D. Iowa 1976) 414 F.Supp. 1393, the Court held that since the Postal Service had already consented to "sue and be sued," in 39 U.S.C. § 401(1), the consent of the United States in 42 U.S.C. § 659 (for alimony and child support debts) is superfluous insofar as garnishments against the Postal Service are concerned. *Id.* at 1397.

Similarly, 5 U.S.C. § 5517 may well be superfluous insofar as the Postal Service is concerned given the fact that 39 U.S.C. § 401(1) is a general waiver of sovereign immunity.

The result of the Ninth Circuit opinion is that in order for a State to establish a program with a federal agency under 5 U.S.C. § 5517 to withhold current anticipated tax liabilities from federal employees, the State must forfeit its right to collect delinquent tax liabilities by garnishing the wages of these employees. Congress could not have intended such a result.

The Postal Service should cooperate with the states in the collection of current and delinquent taxes. It does not contribute to the general welfare for the Postal Service to frustrate the legitimate tax collection activities of the states. There can be no public purpose served by allowing Postal Service employees to escape paying their taxes.

The majority Opinion of the Ninth Circuit panel is clearly erroneous and has created an anomalous situation. This is the first time insofar as the Franchise Tax Board is aware, that any Circuit court has prohibited a levy or garnishment of the wages of Postal Service employees.

The Postal Reorganization Act of 1970⁴ reorganized the functions of what previously was referred to as the United States Post Office into the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service without any qualification regarding the collection of delinquent taxes owed by its employees and provided that it may "sue and be sued." The phrase "sue and be sued" embraces all civil legal proceedings. *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292. The Postal Service can "sue and be sued" like a private employer. 39 U.S.C. § 401(1); See *F.H.A. v. Burr (supra)* 309 U.S. 242, 245.

Relying on this waiver of sovereign immunity, at least seven Circuits have allowed ordinary judgment creditors to garnish

⁴Act of August 12, 1970, Pub.L. No. 91-375, 84 Stat. 719, codified at 39 U.S.C. §§ 101, *et seq.*

the wages of Postal Service employees for payment of *any* debt owed by the employees. However, the Ninth Circuit panel herein barred the Franchise Tax Board from using its tax levy to garnish those same wages of those *same* Postal Service employees for payment of state income taxes. In light of the vital importance of the prompt collection of state taxes and the absence of any qualification upon the waiver of sovereign immunity of the Postal Service in 39 U.S.C. §§ 401, *et seq.*, the majority opinion must be reversed.

The Postal Service would distinguish the Franchise Tax Board's levy from that of other general creditors in that general creditors must obtain a court judgment before they garnish an employee's wages while the Franchise Tax Board is not required to obtain a court judgment before it may issue a levy to collect its tax.⁵

As the Board will discuss more fully, *infra*, after a tax liability has become due and payable, the Board has the equivalent of a judgment and has all of the remedies of a judgment creditor. The Order to Withhold is like post-judgment execution. *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382. Thus it is not necessary for the Board to obtain a court judgment before it levies on the wages of a delinquent taxpayer.

The Postal Service has contended below that it could not honor the Franchise Tax Board's levy because of 31 C.F.R. § 215.12 which states that nothing under the withholding agreements (executed pursuant to 5 U.S.C. § 5517) shall require United States agencies to collect delinquent tax liabilities of federal employees. However, the Postal Service also admitted at oral argument at the district court level that had the Franchise Tax Board obtained a court judgment, the garnishment would have been honored. (A. 35, 41.)

⁵The Ninth Circuit approved the use of an administrative wage garnishment and did not require the taxing agency to obtain a judgment in the companion Employment Development Department case. The Ninth Circuit apparently relied solely on 5 U.S.C. § 3517 to find that the Franchise Tax Board could not garnish the Postal Service employees' wages.

This admission leaves the Postal Service in the untenable position of arguing that it is prohibited from collecting any delinquent tax liabilities pursuant to 31 C.F.R. § 215.12, yet admitting that it would honor the State's tax levy if the Franchise Tax Board obtained a technical court judgment. The Postal Service is apparently relying on the "delinquent tax liabilities" language of 31 C.F.R. § 215.12, and argues that the section *precludes* the Postal Service from collecting delinquent taxes, yet then admits it *would* collect delinquent taxes if the administrative levy were reduced to judgment. There is no logic in this argument.

In all, the anomalous situation which the majority Opinion has created is simply unsupported by the record and the law. 5 U.S.C. § 5517 and 39 U.S.C. § 401(1) can harmoniously coexist. Wage garnishments for state tax debts of Postal Service employees simply are not preempted by 5 U.S.C. § 5517 because they are *authorized* by 39 U.S.C. § 401(1).

To summarize, the Franchise Tax Board contends that:

1. The Postal Reorganization Act waived generally the sovereign immunity of the Postal Service. At least seven other Circuits have held that ordinary judgment creditors may garnish the wages of Postal Service employees. As such the Franchise Tax Board should have been permitted to use its tax levy to garnish the earnings of the employees of the Postal Service.
2. The collection of state taxes is a matter of extreme importance. Before an infringement upon that vital right may be permitted, it must be clearly demonstrated that indeed a federal statute such as 5 U.S.C. § 5517 was intended to expressly limit that right. However, in this instance, § 5517 was not intended to limit the collection of state taxes; rather it was meant to facilitate that collection through payroll withholding. Contrary to the majority Opinion, § 5517 was not intended to restrict the collection of delinquent state tax liabilities where such collection is authorized under the provisions of another Act of Congress such as 39 U.S.C. § 401(1). The Franchise Tax Board sought only to be permitted to treat the Postal Service as it would a private employer or enterprise. In light

of the Postal Reorganization Act, such a treatment is completely warranted if not mandated.

3. The majority Opinion has created an anomalous situation where the Board's tax levy was not honored to collect the tax debts of Postal employees yet garnishments to collect commercial debts were honored, as were as the administrative tax levies of the Employment Development Department. This is completely unwarranted and in fact conflicts with longstanding authority regarding the preeminence of tax debts.

4. The majority Opinion has disregarded the Postal Service's legal admission that garnishment of Postal employees' wages was permissible, even in light of their 5 U.S.C. § 5517 argument, if the Board obtained a court judgment for taxes. This admission means that the Franchise Tax Board cannot be preempted by 5 U.S.C. § 5517.

5. Finally, as Postal employees reside and are required to pay state and local taxes not only in California but also in virtually all of the States, the problem of how to collect these delinquent liabilities is not exclusive to California.

II.

THE POSTAL SERVICE MAY SUE AND BE SUED. IT HAS NO SOVEREIGN IMMUNITY.

The Postal Reorganization Act of 1970 replaced the United States Post Office with the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service.⁶ It provides in pertinent part:

"The Postal Service shall have the following general powers:

"(1) to sue and be sued in its official name: . . ."

Waivers by Congress of governmental immunity from suit should be construed liberally in the case of federal instru-

⁶This is assuming the Postal Service was ever given any sovereign immunity by Congress. As this Court in *R.F.C. v. Merchant Corp.* (1941) 312 U.S. 81, pointed out, there is no presumption that an agent of the government is clothed with sovereign immunity. *Id.* at 83.

mentalities. *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *F.H.A. v. Burr* (1940) 309 U.S. 242, 245; *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84.

In *F.H.A. v. Burr*, (*supra*), 309 U.S. 242, decided in 1940, this Court pointed out that there was disfavor with the doctrine of governmental immunity from suit. *Id.* at 245. Over 35 years later, in 1975, the Seventh Circuit in *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201 cited numerous authorities for the proposition that the "widespread dissatisfaction with the doctrine of sovereign immunity has continued unabated." *Id.* at 203.

A. The Postal Service Is Not Immune From Garnishment Proceedings.

Pursuant to this waiver of sovereign immunity, Federal Courts of Appeal in seven of the Circuits have expressly held that the Postal Service is not immune from state garnishment or other related proceedings. *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954, 960; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1149; *Goodman's Furniture v. United States Postal Service* (3rd Cir. 1977) 561 F.2d 462, 465; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292; *Beneficial Finance Co. of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-128; *Assoc. Financial Services of America v. Robinson* (5th Cir. 1978) 582 F.2d 1. The Ninth Circuit has also stated in dicta that 39 U.S.C. § 401 above may now permit suits against the Postal Service that were prohibited against its predecessor, such as garnishment proceedings. *Sportique Fashions, Inc. v. Sullivan* (9th Cir. 1979) 597 F.2d 664, 665-666, fn. 2. The essence of these holdings is that pursuant to 39 U.S.C. § 401(1), the Postal Service stands in no different position than a private enterprise and thus, cannot use the doctrine of sovereign immunity in

order to block state garnishment or other related proceedings.⁷ As far as the Board is aware, no Circuit before this decision of the Ninth Circuit has ever held that the Postal Service is immune from state garnishment.⁸

In a well-known trilogy of cases decided over 40 years ago, this Court set forth general guidelines with regard to the proper application of the principle of sovereign immunity.

In *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, this Court found that a governmental corporation was amenable to suit even though it had no "sue and be sued" clause. This Court stated, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.* at 388.

Congress has provided that various governmental agencies may "sue and be sued." In connection with these agencies, the question has arisen whether "sue and be sued" includes garnishment and attachment.

F.H.A. v. Burr (1940) 309 U.S. 242 dealt specifically with the issue of garnishment. This Court allowed a judgment creditor of an F.H.A. employee to garnish the employees' wages. This Court said, "[I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued', that agency

⁷ If Congress had disagreed with these decisions, it could have changed the law. For example, 38 U.S.C. § 1820(a)(1) initially included a "sue and be sued" clause applicable to the Veteran's Administration. Following a district court decision upholding wage garnishments under that statute against VA employees, the statute was amended to "qualify" the "sue and be sued" clause explicitly stating that wage garnishments were not permitted under the authority of that statute. See *May Dept. Stores Co. v. Smith* (8th Cir. 1978) 572 F.2d 1275, 1277 cert. denied (1978) 439 U.S. 837.

Obviously, if a qualification of the Postal Service's "sue and be sued" clause was intended for tax debts, Congress could have so amended 39 U.S.C. § 401(1).

"In fact, Judges in two of the Circuits have been critical of the Postal Service for continuing to litigate the "sue and be sued" clause after they have been unsuccessful in several Circuits. See e.g., Judge Lay in *May Dept. Stores Co. v. Williamson*, *supra*, 549 F.2d 1147, 1149-1150; and Judge Weis in *Goodman's Furniture v. United States Postal Serv.*, *supra*, 561 F.2d 462, 465-466.

is not less amenable to judicial process than private enterprise under like circumstances would be." *Id.* at 245.

In *F.H.A. v. Burr, supra*, this Court also found that "sue and be sued" included "all civil process incident to the commencement or continuance of legal proceedings", and that garnishment and attachment are generally included by statute in the process of collecting a debt. *Id.* at 245-246.

The test of *Burr* applies to the Postal Service because it is clear it has been launched into the commercial world and does indeed engage in commercial and business transactions with the public. See, *Standard Oil Div., American Oil Co. v. Starks, supra*, 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson, supra*, 549 F.2d 1147, 1148.

Finally, in *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, this Court found that the "sue and be sued" clause applicable to the Reconstruction Finance Corporation (R.F.C.) authorized the allowance of costs against the R.F.C. in an unsuccessful lawsuit. This Court found that the R.F.C. transactions were "akin to those of private enterprise" *Id.* at 83, and "the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." *Id.*

B. Congress Has Made the Postal Service Independent and Has Given It the Attributes of a Business.

The legislative history and statutory scheme make it clear that Congress intended that the Postal Service function as a business and operate independently.

The Postal Service is an "independent establishment of the executive branch of the Government of the United States . . ." (39 U.S.C. § 201.)

Congress intended the Postal Service to be conducted in a "businesslike way." (1970 U.S. Code Cong. & Admin. News, pp. 3649, 3660.)

Congress intended to introduce modern management and business practices to the Postal Service by eliminating various legislative, budgetary, personnel and financial problems which had hindered the old Post Office. *Id.* at 3650.

The following demonstrate the many ways that Congress has created the Postal Service in the image of a business.

The Postal Service may, *inter alia*, enter into and perform contracts, execute instruments and determine how its money will be spent; determine and keep its own system of accounts, acquire, hold, maintain, sell and lease real or personal property, construct, operate, lease and maintain buildings, facilities, equipment or improvements on property owned or controlled by it, accept gifts or donations and settle and compromise claims against it. (39 U.S.C. §§ 401(3)-(9).)

It is clear that Congress intended to pattern the Postal Service after private industry in the area of labor relations. The employees of the Postal Service have the right to organize into bargaining units and to bargain with management with regard to wages, hours, and working conditions. (39 U.S.C. §§ 1201, *et seq.*) The National Labor Relations Board, not the Federal Labor Relations Authority, 5 U.S.C. §§ 7101, *et seq.*, supervises the organizing process. (39 U.S.C. §§ 1202, *et seq.*)

"Generally speaking, H.R. 17070 would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters — including wages and hours — which their neighbors in private industry have long been able to bargain for." (1970 U.S. Code Cong. & Admin. News, pp. 3649, 3662.)

The Postal Service is also quite autonomous in the area of fiscal affairs.

Congress meant for the Postal Service "to become self-sustaining — eliminating the postal deficit — by January 1, 1978." *Id.* at 3659.

The capital of the Postal Service is separate from the capital of the United States, 39 U.S.C. § 2002; the Postal Service has exclusive control over the Postal Service Fund which finances the day to day operations of the Postal Service, 39 U.S.C. § 2003; the Postal Service has the authority to borrow

money and to issue obligations without the prior consent of the United States Treasury, 39 U.S.C. §§ 2005, 2006.

The legislative history indicates that the public obligations:

"would not be guaranteed by the United States and would not be within the debt ceiling unless the Postal Service requests the Secretary of the Treasury to pledge the full faith and credit of the United States and the Secretary determines that it would be in the public interest to do so." 1970 U.S. Code Cong. & Admin. News, pp. 3649, 3659.

The Postal Service was organized in such a way that the management of the Postal Service would be insulated from the arena of politics. *Id.* at 3660.

The Postmaster General was taken out of the President's cabinet and the authority to appoint and supervise him was given to a Board of Governors. (39 U.S.C. §§ 202(c), 203.)

The Postal Service has liberal powers with regard to the areas of employment, 39 U.S.C. §§ 1001, *et seq.*, and transportation, 39 U.S.C. §§ 5001, *et seq.*

The Postal Service has the right to obtain necessary property and services independently of the executive agencies. 39 U.S.C. § 410(a), 39 C.F.R., § 601.

The Postal Service has also been freed from many of the former constraints on the Post Office. 39 U.S.C. § 410(a) provides that, with a few exceptions, "no Federal Law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds . . . shall apply to the exercise of the powers of the Postal Service."

As the Postal Service was "launched into the commercial world," under the Postal Reorganization Act (See *Standard Oil, supra*, 528 F.2d 201, 204; *Goodman's, supra*, 561 F.2d 462, 464-465, *May Dept. Stores, supra*, 549 F.2d 1147, 1148; *Beneficial Finance, supra*, 571 F.2d 125, 127-128), there is clearly no basis in law or policy for blocking the instant action wherein the Postal Service has acted in violation of the Board's tax levy. The Postal Service is simply not immune from the Board's tax collection procedures.

If a private employer or enterprise acted in violation of California Revenue and Taxation Code §§ 18817-18819, the Board could institute legal action against that private employer or enterprise to recover the amounts not transmitted to the Board.

The Postal Service is now akin to any other employer in the commercial world and since all other employers are required to honor the Franchise Tax Board's levy, there is no reason why the Postal Service should be treated differently.

C. Congress Did Not Intend the Sue and Be Sued Clause to Be Used in a Narrow Sense.

As this Court pointed out in *F.H.A. v. Burr, supra*, 309 U.S. 242, where Congress intends to preclude garnishment from a "sue and be sued" clause, it has done so explicitly. *Id.* at 247.

The only restrictions on the waiver of immunity created by 39 U.S.C. § 401 are found at 39 U.S.C. § 409(b) which provides that the Postal Service will have the benefit of certain procedures that are applicable to suits against the United States and its officers and 39 U.S.C. § 409(c) which provides that the Federal Tort Claims Act is applicable to the Postal Service.

The Postal Reorganization Act is silent as to garnishment. This is significant because when Congress wishes to exclude garnishment from a waiver of sovereign immunity it knows how to do that.

With regard to the Secretary of Education, 20 U.S.C. § 1132d-1(b) provides in pertinent part that:

"[T]he Secretary may . . . sue and be sued . . . but no attachment, . . . garnishment . . . shall be issued against the Secretary. . . ."

With regard to the Small Business Administration, 15 U.S.C. § 634(b)(1) provides that "[T]he Administrator may sue and be sued . . . but no attachment . . . garnishment . . . shall be issued against the Administrator. . . ."

As the Second Circuit pointed out in *Beneficial Finance (supra)*, 571 F.2d 25, Congress created the Postal Service 30

years after this Court's decision in *F.H.A. v. Burr, supra*. Thus, Congress was aware that a broadly worded "sue and be sued" clause would be interpreted as a liberal waiver of Postal Service immunity and if Congress had intended to create a more narrow waiver of immunity, it could have done so. *Id.* at 128.

III.

CALIFORNIA'S LEVY STATUTE WAS NOT PREEMPTED BY 5 U.S.C. § 5517.

A. Introduction.

In deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause, it is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict. *Perez v. Campbell* (1971) 402 U.S. 637, 644. The court's function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz* (1941) 312 U.S. 52, 67; Accord, *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158. An unconstitutional conflict will be found where compliance with both the federal and state statutes is a physical impossibility. *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-3.

It will *not be presumed* that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas* (1952) 344 U.S. 199, 202-3. Conflicts between state and federal statutes should *not* be sought out where *none clearly exist*. *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967.

The exceptional importance of the collection of state taxes is not a matter which should be lightly cast aside. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means

of collection of these liabilities must be preserved not only for California but also for any other state in which Postal employees reside.

The State of California has an extremely important interest in collecting taxes from its taxpayers. This interest which is shared by all other states and taxing authorities was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Id.* at 110.

This Court also stated that "[T]he prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government" (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 259; Accord *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

5 U.S.C. § 5517 was enacted originally in 1952 as 5 U.S.C. § 84b. Act of July 17, 1952, Pub. L. No. 82-587, 66 Stat. 765. It was enacted in order for the federal government to cooperate with state tax wage withholding programs with respect to federal employees. In fact, the Congressional debate with regard to § 5517 made it clear that it has been the long-standing policy of Congress "not to interfere with the enforcement or collection of state income tax laws." *Lung v. O'Cheskey* (D.N.M. 1973) 358 F.Supp. 928, 932, affirmed (1973) 414 U.S. 802.

The legislative history of 5 U.S.C. § 5517 is clear that current state payroll withholding akin to the income tax with-

holding provisions of the Internal Revenue Code (Codified at 26 U.S.C. §§ 3401, *et seq.*) was the sole aim of the legislators. The following statement by Representative Prouty, from Vermont, is illustrative:

"The enactment of S. 1999 would accord to the States the same cooperation in tax collections which the Federal Government demands from them . . . and therefore increase the revenue of State governments, lessening their dependence on the Federal Government and strengthening our system of duality of sovereignty." (98 Cong. Record-House 9374 (1952).)

Furthermore, the legislative history indicates that Section 5517 was enacted because Congress believed without the statute, federal agencies lacked authority to withhold state income taxes from the wages of their employees. See, 98 Cong. Record-House 9374 (1952); Sen. Rept. No. 1309 reprinted in 1952 U.S. Code Cong. & Admin. News p. 2360; House Rept. No. 2474 reprinted in 1952 U.S. Code Cong. & Admin. News pp. 2433, 2434. As such, section 5517 was a limited waiver of sovereign immunity for all federal agencies solely in the area of payroll withholding of current anticipated tax liabilities.

B. Wage Garnishment and Payroll Withholding Do Not Involve the Same Subject Matter.

In reaching its conclusion that 5 U.S.C. § 5517 preempts the Board's wage garnishments under California Revenue and Taxation Code § 18817, the majority opinion has incorrectly stated that §§ 5517 and 18817 deal with the same subject matter. *Employment Development Dept. v. U.S. Postal Service, supra*, 698 F.2d 1029, 1036. (A. 13.) However, 5 U.S.C. § 5517 is only involved with payroll withholding of current anticipated tax liabilities. It neither prohibits nor permits wage garnishment of delinquent tax liabilities. Section 18817 is only involved with the collection of delinquent tax liabilities. The State of California has a full scheme of payroll withholding statutes patterned after the Internal Revenue Code designed for the collection of current anticipated tax liabilities. Section 18817 is not part of that scheme.

Payroll withholding under California Law is a relatively recent phenomenon in that it was not until 1972 that it commenced with respect to California residents. California Revenue and Taxation Code section 18806 (as it read prior to 1980 repeal and reenactment).⁹ On the other hand, the Franchise Tax Board's garnishment provision under § 18817 has been in existence for some forty years. Currently, payroll withholding is administered by the Employment Development Department and the pertinent statutes are now found in California Unemployment Insurance Code §§ 13000, *et seq.* Moreover, wage garnishments for taxes are now controlled by provisions of California Code of Civil Procedure §§ 706.070 *et seq.* (See footnote No. 2 *supra*.) This plainly indicates that the placement of the prior California payroll withholding provisions (§§ 18805-18816) under the same Article and Chapter of the California Revenue and Taxation Code as the prior wage garnishment provisions (§§ 18817-18819) simply does not mean that they involve the same subject matter.

To further demonstrate the diverse nature of payroll withholding and wage garnishment, it should be noted that comparable federal payroll withholding and federal wage garnishments for taxes do not appear in the same Subtitle much less

⁹It was only after the enactment of the withholding statutes that California had any interest in requesting a § 5517 agreement from the Secretary of the Treasury. On February 25, 1974, the State of California executed an agreement with the United States Secretary of the Treasury which provided, *inter alia*, that agencies of the United States would comply with California's withholding provisions. (J.A. 3-5.)

In its Petition for Rehearing, the Board pointed out to the Ninth Circuit that it was incorrect when it stated that the State of California entered into a § 5517 agreement on November 6, 1952. (J.A. 57.)

The Board pointed out that California entered into the § 5517 agreement in February of 1974 (J.A. 57) and further, that California did not even begin payroll withholding of California residents until January 1, 1972. *Id.*

The Ninth Circuit amended its opinion to state that "[U]ncontroverted evidence in the record establishes that as early as 1962, withholding was provided by agreement pursuant to § 5517 between the Secretary of the Treasury and the State of California." (A. 26.) The Board respectfully contends that the amended Opinion is still incorrect in light of the fact that withholding for California residents in California did not begin until 1972.

same Chapter of the Internal Revenue Code. The payroll withholding provisions can be found at 26 U.S.C. §§ 3401, *et seq.* These provisions are located in Chapter 24 of Subtitle C of the Code. However, the Internal Revenue Service's wage garnishment provisions are found in Chapter 64 of Subtitle F at 26 U.S.C. §§ 6331, *et seq.*

The California payroll withholding and garnishment provisions were patterned after the Internal Revenue Code.

A. With regard to *withholding*, compare:

1. California Revenue and Taxation Code § 18806 (the former withholding statute)
2. California Unemployment Insurance Code §§ 13020-13031 (the present withholding statutes)
3. 26 U.S.C. § 3402 (the present Internal Revenue Code withholding statute)

B. With regard to *wage garnishment, for taxes* compare:

1. *Authorization to garnish wages*
 - a. California Revenue and Taxation Code § 18817 (effective for wage garnishments until January 1, 1980)
 - b. California Code of Civil Procedure §§ 723.070, *et seq.* (effective January 1, 1980)
 - c. California Code of Civil Procedure §§ 706.070, *et seq.* (effective July 1, 1983)
 - d. 26 U.S.C. § 6331(a) and (d).
2. *Liability for failure to honor levy*
 - a. California Revenue and Taxation Code § 18818 (effective for wage garnishments until January 1, 1980.)
 - b. California Code of Civil Procedure § 723.153 (effective January 1, 1980)
 - c. California Code of Civil Procedure § 706.153 (effective July 1, 1983)
 - d. 26 U.S.C. § 6332(c)(1).
3. *Immunity from liability for compliance*
 - a. California Revenue and Taxation Code § 18819 (effective for wage garnishments until January 1, 1980)

- b. California Code of Civil Procedure § 723.154 (effective January 1, 1980)
- c. California Code of Civil Procedure § 706.154(b) (effective July 1, 1983)
- d. 26 U.S.C. § 6332(a) and (d).

The Board respectfully contends that the majority Opinion has mischaracterized the position of the Board. The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has argued that 5 U.S.C. § 5517 only applies to current payroll withholding and by its terms does not prohibit wage garnishment for state taxes provided authority to garnish exists under the provisions of other statutes. Two separate sovereign immunities are involved in this case — 5 U.S.C. § 5517 and 39 U.S.C. § 401(1). The sovereign immunity which was waived to a limited degree in 5 U.S.C. § 5517 applied to all federal agencies and pertained only to current payroll withholding of state taxes for those agencies. However, the sovereign immunity which was waived in 39 U.S.C. § 401(1) is a general waiver of sovereign immunity which applied only to the Postal Service. This general waiver has been interpreted by Circuit Courts in at least seven of the Circuits as permitting garnishment of Postal employees' wages. There is no qualification on this waiver of sovereign immunity. Moreover, there is no qualification or limitation on the type of debts which can be garnished from Postal Service employees' wages. Logically speaking, there is no reason to treat Postal employees' commercial debts any differently than their tax debts. Indeed, the majority Opinion below has placed these tax debts on a lower plane than commercial debts which is completely contrary to long established authority.

In the instant matter, the Board utilized its tax levy which is like post-judgment execution. *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, 382. The tax levy, unlike the wage withholding provisions of 5 U.S.C. § 5517, reaches "any credits or other personal property or other things of value, belonging to a taxpayer . . ." California Revenue and Taxation Code § 18817. The tax levy is a collection device which

can be used to collect delinquent tax liabilities. The wage withholding provisions of 5 U.S.C. § 5517 cannot be so used. See, 31 C.F.R. § 215.12. The Postal Service and the Ninth Circuit have attempted to extend 5 U.S.C. § 5517 far beyond its legislative intent. 5 U.S.C. § 5517 pertains only to payroll wage withholding and has no applicability with respect to the collection of delinquent tax liabilities from Postal Service employees.

It is not reasonable to conclude that Congress intended States to forfeit their means of collecting delinquent taxes in order to establish a program for withholding current anticipated taxes from federal employees.

Plainly, the majority's analysis below in attempting to find a conflict between 5 U.S.C. § 5517 and California Revenue and Taxation Code § 18817 is faulty. Payroll withholding is not the same as wage garnishment. Section 5517 does not deal with wage garnishment nor does it purport to prohibit wage garnishment of federal employees where such is authorized under another statute.

C. As There Is No Actual Conflict Between 5 U.S.C. § 5517 and California Revenue and Taxation Code Sections 18817-18818, the Supremacy Clause Does Not Bar the Board's Action Herein.

One critical question which must be answered in any matter when the preemption of state statutes by federal statutes is alleged is whether there really is a conflict between the statutes. It is the Board's position that a close scrutiny of 5 U.S.C. § 5517 will reveal that no conflict exists.

Subdivision (b) is the portion of 5 U.S.C. § 5517 which the Ninth Circuit majority found to conflict with California Revenue and Taxation Code § 18817. It provides in pertinent part:

“(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States

or its employees to a penalty or liability because of this section."

It is clear that *identical* requirements were imposed upon *all* employers under California Revenue and Taxation Code §§ 18817-18819. No distinction was made between the United States and other employers. Thus, the first part of 5 U.S.C. § 5517(b) is not violated. Cf. *Clincher v. United States, States of Montana & Arizona* (Ct. Cl. 1974) 499 F.2d 1250, 1253-4, cert. denied (1975) 420 U.S. 991.

The second phrase in 5 U.S.C. § 5517(b) ("or which subjects the United States or its employees to a penalty or liability *because of this section*") (Emphasis added), is also not in conflict with §§ 18817-18819 due to the inclusion of the provision "because of this section". The Board is *not* suing for violation of the agreement set forth in 5 U.S.C. § 5517. It is suing for violation of § 18817 under the authority of § 18818. No penalty or liability because of 5 U.S.C. § 5517 is being sought. Accordingly, no conflict between state and federal statutes clearly exists in this matter and none should be sought out. *Seagram & Sons, Inc. v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967. The Postal Service can comply with § 5517 and simultaneously honor the Board's tax levy while doing no injustice to the requirements of § 5517. Thus, there is absolutely no impossibility of being able to comply with both the federal and state statutes. *Florida Avocado Growers v. Paul, supra*, 373 U.S. 132, 142-3. Finally, as Congress enacted 5 U.S.C. § 5517 in order to *cooperate* with state tax collection, it cannot seriously be contended that § 18817 stands as an obstacle to the accomplishment and execution of these cooperative purposes and objectives of Congress. See 1952 U.S. Code Cong. & Admin. News pp. 2360-1, 2433-4, *Hines v. Davidowitz, supra*, 312 U.S. 52, 67.

Apparently, the Ninth Circuit also found that 31 C.F.R. § 215.12(a) prohibited the Board's levy. 31 C.F.R. § 215.12(a) provides, *inter alia*, that nothing under the withholding agreements executed pursuant to 5 U.S.C. § 5517 shall require United States agencies to collect delinquent tax liabilities of Federal employees.

That regulation, however, has no application because the Board is *not* seeking to require collection of delinquent tax liabilities under authority of the 5 U.S.C. § 5517 wage withholding agreement. That agreement has nothing to do with whether the Board can collect delinquent tax liabilities through its tax levy statutes. Rather, the Franchise Tax Board is relying solely on its own statutes, Revenue and Taxation Code §§ 18817 and 18818 and 39 U.S.C. § 401(1) to require the Postal Service to honor its levy for delinquent, not current, taxes. This is not prohibited and in fact is allowed by the Postal Reorganization Act.

Finally, it is to be noted that the terms of 5 U.S.C. § 5517 and 31 C.F.R. § 215.12(a) do *not* prohibit the Board's action in any event. The code section and the regulation merely indicate that the collection of delinquent tax liabilities is not authorized thereunder. The instant action of the board is not to enforce the aforementioned agreement but instead, to simply require an employer to comply with California Revenue and Taxation Code §§ 18817-18819.

IV.

THE BOARD MAY INSTITUTE TAX COLLECTION PROCEEDINGS WITHOUT OBTAINING A STATE COURT JUDGMENT PRIOR THERETO.

A. The Board's Procedures.

In this matter, the Board has complied with all of the provisions of the Revenue and Taxation Code in establishing the liabilities of the taxpayers involved in this proceeding. The taxes were due and payable at the time of the Board's tax levy.

A tax may be due and payable where the taxpayer files a return without payment of the self-computed tax shown on the return or the Franchise Tax Board may examine taxpayer returns and determine that additional tax is due. In the latter situation the Franchise Tax Board may mail notice of a proposed deficiency. Revenue and Taxation Code § 18583. If the taxpayer disagrees with the proposed assessment, he may file

a protest under Revenue and Taxation Code § 18590. Upon a protest, the Franchise Tax Board reconsiders the proposed assessment and shall grant the taxpayer an oral hearing if requested. Revenue and Taxation Code § 18592.

If the Franchise Tax Board acts unfavorably on the taxpayer's protest, the taxpayer may appeal such action to the California State Board of Equalization. Revenue and Taxation Code § 18593. The State Board of Equalization thereafter hears the appeal and determines the matter after independent review. Revenue and Taxation Code § 18595.

The taxpayer still has another remedy because upon payment of the assessment, a claim for refund may be filed, Revenue and Taxation Code § 19053, and if the claim is denied, he may file a suit for refund in the Superior Court. Revenue and Taxation Code § 19082. As the Board will discuss *infra*, these procedures clearly meet all requirements of Due Process.

After the tax becomes due and payable, the Board has several alternative methods by which it may effect collection. The methods are cumulative and may be used in combination with or separate from each other. (Revenue and Taxation Code § 18931.)

The Postal Service which admittedly was the employer of three of the four tax debtors in question was required by Revenue and Taxation Code § 18817 to transmit the amounts owed to the tax debtors to the Board. (*See, People v. Freeny* (1974) 37 Cal.App.3d 20, 31; 112 Cal.Rptr. 33, 41.) Any employer required to transmit any amount was to do so without resort to any court action. (Revenue and Taxation Code § 18819.) Accordingly, the law compelled the Postal Service to deliver the funds in question to the Board. (*See, Kanarek v. Davidson* (1978) 85 Cal.App.3d 341, 346; 148 Cal.Rptr. 86, 89.)

Any employer failing to transmit the amount due to the Board after service of an Order-to-Withhold is liable to the Board for such amount. (Revenue and Taxation Code § 18818.)

As the Postal Service failed to comply with the law, it is liable to the Board for the amounts it should have transmitted. If the Postal Service failed to honor a garnishment from an

ordinary judgment creditor, the Postal Service would be liable for that action and the consequences should be no different with regard to a levy of the Board.

B. It Was Not Necessary for the Board to Obtain a Judgment. When the Assessment Becomes Final, the Board Is Analogous to a Judgment Creditor and the Order to Withhold Is Like a Judgment Creditor's Garnishment.

The heretofore cited Postal Service garnishment cases should dispose of the instant action favorably to the Board. The main difference between the Postal Service cases and the wage garnishment of the Board is that the other creditors had obtained a state court judgment and were seeking to collect ordinary debts while the Board was seeking to collect a delinquent tax pursuant to a tax levy.

At the oral argument of the cross motions in the instant matter, it was stated by counsel for the Postal Service that had the Board obtained a technical state court "judgment" and levied on that "judgment," the Postal Service would have honored that levy. (A. 35, 41.) However, counsel for the Postal Service contended that the Board's tax levy would not be honored because the Postal Service believes there is no determination of liability in this instance. (A. 41.) The Postal Service's statements are completely erroneous and fly directly in the face of long-standing and well established authority upholding the validity and constitutionality of summary tax collection procedures.¹⁰

It is clear that the Board's levy is analogous to a judgment creditor's garnishment. In *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, the Board levied upon the taxpayer's employer after the taxpayer had

¹⁰The fallacy of this argument is further highlighted by the fact that the Postal Service did not seek review from this Court of that portion of the Ninth Circuit Opinion below which allowed the Employment Development Department to use an administrative levy to levy on monies owed to mail transportation contractors. (*Employment Development Dept. v. U.S. Postal Service*, *supra*, 698 F.2d 1029, 1033-1034; A. 6-7.)

filed a return without full payment of the self-computed tax. The Court allowed the levy and stated that its use was "like post-judgment execution." *Id.* at 382. This case obviates any argument the Postal Service can make with regard to the need for a judgment before honoring the tax levy.

Summary administrative proceedings to collect taxes have been consistently upheld by this Court. Summary collection procedures to collect delinquent taxes are constitutionally permissible. No "judgment" of any kind is necessary. *Phillips v. Commissioner* (1931) 283 U.S. 589, 595-7; *Bull v. United States* (1935) 295 U.S. 247, 260; *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 352 fn. 18; *Scottish Union & Nat. Ins. Co. v. Bowland* (1905) 196 U.S. 611, 632; *Bomher v. Reagan, supra* (9th Cir. 1975) 522 F.2d 1201, 1202.

A tax assessment is given the force of a *judgment*, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. *Bull v. United States, supra*, 295 U.S. 247, 260; quoted with approval in *G.M. Leasing Corp. v. United States, supra*, 429 U.S. 338, 352, fn. 18. The underlying rationale for approval of the summary procedures is that the very existence of government depends upon the prompt collection of the revenues. *Id.* As long as there is an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute authorizing summary collection procedures meets the requirements of due process. *Phillips v. Commissioner, supra*, 283 U.S. 589, 596-597. A suit for refund is an adequate alternative means of subsequent judicial review. *Id.*, at 597-598.

The Board has the status of a judgment creditor and is entitled to all of the remedies associated therewith. See *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382; *Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board of State of California* (9th Cir. 1965) 348 F.2d 9, 10-11; *C.I.T. Corporation v. United States* (N.D. Calif. 1972) 344 F.Supp. 1272, 1276; *United States v. Fisher* (N.D. Calif. 1948) 93 F.Supp. 73, 75-76.)

The Board's tax collection procedures conform to the standards set forth above by this Court. In this case, collection of delinquent taxes is permitted without obtaining a state court judgment prior thereto. The taxpayer has available to him or her subsequent judicial review in the form of the suit for refund procedure. California Revenue and Taxation Code §§ 19081-19092.

V.

**UNDER THE BUCK ACT THE BOARD HAS THE POWER TO
LEVY AND COLLECT PERSONAL INCOME TAX FROM
POSTAL SERVICE EMPLOYEES.**

It is the long established policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. *Non-resident Taxpayers Ass'n. v. Municipality of Phila.* (3rd Cir. 1973) 478 F.2d 456, 459.

In 1939, this Court held that the salaries of employees or officials of the federal government or its instrumentalities were not immune from taxation by the states. *Graves v. N.Y. ex. rel. O'Keefe* (1939) 306 U.S. 466, 480-7; *State Tax Comm'n v. Van Cott* (1939) 306 U.S. 511, 515.

In the same year as the *Graves* decision, Congress passed the Public Salary Act of 1939 (4 U.S.C. § 111, formerly 5 U.S.C. § 84a), expressly consenting to state taxation of pay or compensation for personal service of federal employees.

In 1940, Congress enacted the Buck Act (4 U.S.C. §§ 105-110) which gave consent to the levy and collection of various taxes from federal employees in federal areas. Section 106 of the Buck Act authorizes the *levy* and *collection* of state income taxes from federal employees.

It is important to note that 4 U.S.C. § 106(a) speaks in terms of the State having full jurisdiction and power to levy and collect income taxes within a "federal area" just as if it were not a federal area. *Howard v. Commissioners* (1953) 344 U.S. 624, 628-9.

The term "federal area" is defined in section 110(e) of the Buck Act and has been recently held by the Supreme Court of Colorado to include the branch offices of the Postal Service

as well as the main post offices. *Rountree v. City and County of Denver* (Colorado 1979) 596 P.2d 739, 740-1. As a result, the City and County of Denver was permitted to levy and collect from eight Postal Service employees an occupation tax regardless of the working location of the employees. *Id.*

Unquestionably, in order to give the Buck Act any meaning, the taxing authority must have the power to *enforce* the levying and collection of its tax both within and without federal areas. Such a result has been reached in *City of Philadelphia v. Konopacki* (Penn. 1976) 366 A.2d 608, 610.

CONCLUSION.

Congress could not have intended for a State to forfeit its ability to collect delinquent income taxes by its participation in a 5 U.S.C. § 5517 agreement.

The Postal Reorganization Act waived the sovereign immunity of the Postal Service. The Board is entitled to the rights and remedies of a judgment creditor. As such it should be permitted to garnish the earnings of the employees of the Postal Service.

For these reasons, the Board respectfully contends that the decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1983

FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

v.

UNITED STATES POSTAL SERVICE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether a state agency, without resort to judicial process, may require the Postal Service to withhold sums from the wages of its employees to pay the employees' delinquent state income tax liabilities.

(1)

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In the Supreme Court of the United States
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FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

v.

UNITED STATES POSTAL SERVICE

*ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1-16) is reported at 698 F.2d 1029. The opinion of the district court (J.S. App. 19-25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 (J.S. App. 1). A petition for rehearing was denied on June 3, 1983 (J.S. App. 26). A notice of appeal was filed on August 12, 1983 (J.S. App. 27). The Jurisdictional Statement was filed on August 31, 1983, and the Court noted probable jurisdiction on January 9, 1984 (J.A. 62). The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(2). We discussed this Court's jurisdiction at pages 7-8 of the Motion to Dismiss or Affirm.

STATEMENT

Appellant, an agency of the California state government, is responsible for collecting state personal income taxes. Under Cal. Rev. & Tax. Code § 18817 (West 1983), appellant may "require any employer * * * having in [its] possession, or under [its] control, any credits or other personal property or other things of value, belonging to a taxpayer * * * to withhold * * * the amount of any tax, interest, or penalties due from the taxpayer * * * and transmit the amount withheld to" appellant. These "orders to withhold" are administrative levies, issued by appellant without any judicial hearing or court order. See Cal. Rev. & Tax. Code §§ 18583 *et seq.* The taxpayer's remedy is to seek a refund through administrative procedures; if administrative relief is denied, the taxpayer must institute a suit for a refund. See Cal. Rev. & Tax. Code §§ 19051 *et seq.* and 19082.

In 1978, appellant sought to collect delinquent state income taxes from four Postal Service employees by serving orders to withhold, pursuant to Section 18817, on the Postal Service. When the Postal Service declined to withhold the amounts sought by appellant from the employees' wages, appellant brought this action against the Postal Service in the United States District Court for the Central District of California, seeking the amounts in issue. Appellant relied on Cal. Rev. & Tax. Code § 18818, which provides that "[a]ny employer or person failing to withhold the amount due from any taxpayer and to transmit the same to [appellant] after service of a notice pursu-

ant to Section 18817 is liable for such amounts." ¹ J.S. App. 7-8, 20-21; J.A. 8-14. Appellant did not attempt to reduce the alleged tax delinquencies to judgment or to seek a judicial order of garnishment or attachment before suing the Postal Service.

The district court granted summary judgment in favor of the Postal Service (J.S. App. 17-25).² It based its ruling primarily on 5 U.S.C. 5517, which specifies that when a state statute provides for taxes to be collected by withholding from employees' pay, the federal government shall, upon request by the state, "enter into an agreement with the State * * * [which] agreement shall provide that the head of each agency * * * shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the [state] tax * * *." The district court noted that the agreement between California and the federal government provides only for the withholding of anticipated taxes and "does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever" (J.A. App. 23).

¹ The district court had jurisdiction by virtue of 39 U.S.C. 409(a) and 28 U.S.C. 1339. Cf. *Franchise Tax Board v. Construction Laborers Vacation Trust*, No. 82-695 (June 24, 1983).

² This action was consolidated with a suit against the Postal Service brought by another California state agency, the Employment Development Department, which sought to recover unemployment insurance taxes allegedly owed by contractors that had done work for the Postal Service. The district court granted summary judgment in favor of the Postal Service (J.S. App. 23-24), but the court of appeals reversed (*id.* at 2-7), and the Postal Service has not sought further review.

The court of appeals affirmed (J.S. App. 1-16). It rejected appellant's argument that 39 U.S.C. 401(1), which provides that the Postal Service may "sue and be sued in its official name," waived the Postal Service's sovereign immunity in such a way as to authorize appellant's orders to withhold. The court reasoned that the "sue and be sued" clause of Section 401(1) was a "general" provision that cannot "override[] the specific limitations and restrictions of 5 U.S.C. § 5517 and the pertinent agreements and regulations." J.S. App. 13. The court noted that the agreement reached by California and the federal government pursuant to 5 U.S.C. 5517 "specifically states: '3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of Federal employees'" (J.S. App. 9-10 (quoting J.A. 3)). The court of appeals noted in addition that regulations implementing Section 5517 contain a similar limitation (J.S. App. 10, citing 31 C.F.R. 215.12(a) (1978)). The court accordingly held (J.S. App. 13):

In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated income tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The court of appeals also rejected appellant's argument that Section 5517 is no longer applicable to the Postal Service (J.S. App. 11-12).

Judge Schroeder dissented. She urged that "[t]he federal courts have consistently held that [39 U.S.C.] 401(1) waives Postal Service immunity from state

garnishment proceedings" and that "[t]he statutory collection process in question here is essentially a garnishment procedure" (J.S. App. 15-16).

SUMMARY OF ARGUMENT

It is well established that a creditor of a federal employee may not collect his debt by levying on wages that the government owes to the employee, unless Congress has enacted a waiver of sovereign immunity that permits such a levy. Appellant contends that the "sue and be sued" clause of the Postal Reorganization Act is a waiver of sovereign immunity that permits it to enforce its orders to withhold against the Postal Service. But the "sue and be sued" clause is, at most, a waiver of immunity from judicial process. It does not authorize appellant's purely administrative orders, which are not issued by a court and have no connection to any judicial proceeding.

A. Appellant proceeds from the premise that the "sue and be sued" clause makes sovereign immunity irrelevant to the Postal Service's affairs. But that is not what the clause says, and in interpreting "sue and be sued" clauses in other statutes, the Court has relied on the plain meaning of the words. To "be sued" is to be subject to a lawsuit—that is, to a "proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him" (*FHA v. Burr*, 309 U.S. 242, 246-247 n.8 (1940), quoting *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 448, 464 (1830) (Marshall, C.J.)). A "sue and be sued" clause generally makes an agency "amenable to judicial process" (*Burr*, 309 U.S. at 245); it waives an agency's immunity "from suit and judicial process,

and their incidents" (*Federal Land Bank v. Priddy*, 295 U.S. 229, 235 (1935)). Appellant's administrative orders are not judicial process and are not an incident of any suit; they are not connected to judicial proceedings in any way.

Both Congress and this Court have recognized a distinction between state judicial proceedings and state administrative proceedings in many contexts. Moreover, administrative process, unlike judicial process, comprises a sprawling and ill-defined class of orders issued by officials, high and petty, of every unit of government across the nation. If appellant's view were to prevail, any one of these officials could order the Postal Service to pay over a sum of money. Levies like appellant's, which seek funds owed by the Postal Service to its employees, have a particularly great potential for disruption; because they are unadjudicated orders that the employee may well dispute, they can precipitate litigation between the Postal Service and the employee, or a dispute between the employee and the alleged creditor in which the Postal Service may become embroiled. There is no reason to believe that Congress, when it reorganized the Post Office in order to improve its efficiency, intended that a routine "sue and be sued" clause would impose on the new Postal Service all of these burdens that result from a complete waiver of immunity from administrative orders.

B. As the courts below noted, Congress has specifically addressed problems associated with the collection of state and local taxes from federal employees, and it has done so in a way that precludes appellant's administrative levies. In 1974, three years after the Postal Reorganization Act took effect, Congress enacted 5 U.S.C. 5520, which provides for the

withholding of anticipated local tax liabilities; the text and legislative history of Section 5520 demonstrate that Congress, and specifically the committees responsible for the PRA, assumed that the "sue and be sued" clause of the PRA did *not* permit state and local taxing authorities to issue administrative orders to the Postal Service in an effort to collect Postal Service employees' taxes.

Moreover, Congress has never authorized state taxing authorities to collect delinquent taxes from federal employees by simply serving on federal agencies whatever levies are available under state law. With one exception, Congress has chosen to aid the collection of state and local taxes from federal employees by authorizing the withholding of employees' anticipated—not delinquent—tax liabilities. Withholding of anticipated tax liabilities is far less likely than the withholding of delinquent taxes to disrupt the employer-employee relationship or to cause disputes and litigation in which the federal agency may become involved.

The one exception is the "piggyback" provisions of the Internal Revenue Code, under which state agencies may collect delinquent taxes by having sums withheld from federal employees' compensation. But in order to reduce the administrative burdens on the federal government, Congress prescribed specific criteria that a state must meet to take advantage of these provisions and specific procedures that the collection process will follow; appellant has chosen not to take advantage of the "piggyback" enforcement scheme. A standard "sue and be sued" clause should not be interpreted to permit state tax levies, like appellant's, that are inconsistent with the entire pattern of congressional action in this area.

ARGUMENT

CONGRESS DID NOT WAIVE THE IMMUNITY OF THE POSTAL SERVICE FROM STATE ADMINIS- TRATIVE TAX LEVIES

A creditor of a federal employee may not collect his debt by levying on wages owed to the employee by a federal agency, unless Congress has enacted a waiver of sovereign immunity that permits such a levy. The Court has considered this proposition "clear of doubt" for almost a century and a half. *Buchanan v. Alexander*, 45 U.S. (4 How.) 19, 21 (1846); see, e.g., *FHA v. Burr*, 309 U.S. 242, 244 (1940). As the Court has explained: "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted or defeated by state process or otherwise, the functions of the government may be suspended" (*Buchanan*, 45 U.S. (4 How.) at 20). To allow "creditors of [government employees] * * *, by process of attachment, [to] divert the public money from its legitimate and appropriate object" would "[at] all times * * * be found embarrassing, and under some circumstances it might be fatal to the public service" (*ibid.*).

Appellant does not seriously dispute that these principles apply to the Postal Service; appellant appears to recognize that it cannot enforce its orders to withhold unless Congress has waived the Postal Service's sovereign immunity in a way that permits such administrative levies. Appellant identifies 39 U.S.C. 401(1), the "sue and be sued" clause of the Postal Reorganization Act (PRA), as the waiver of sovereign immunity on which it relies. That clause provides that "[t]he Postal Service shall have the

* * * general power[] * * * to sue and be sued in its official name * * *."

Appellant argues at length, citing many lower court decisions, that under Section 401(1) the Postal Service must honor judicial garnishment orders (see, e.g., Br. 12, 17-19, 22-23). But this case presents no question concerning judicial garnishment orders. Appellant, or any other creditor, may garnish or attach Postal Service employees' wages by obtaining the appropriate judicial writ. Postal Service regulations specifically mandate the withholding from employees' wages of sums that are garnished by court order. USPS, *Financial Management Manual* § 431.1(g) (1978); see 39 C.F.R. 211.2(a)(2). If appellant had reduced the alleged tax delinquencies of the Postal Service employees to judgment, the Postal Service would have honored judicial writs of garnishment designed to execute the judgments.

This case instead concerns whether Congress intended to permit Postal Service employees' salaries to be diverted by a levy—such as appellant's order to withhold—that is issued not by a court but by a state administrative agency. Appellant simply asserts that its administrative levies should be treated in the same fashion as court orders, without explaining why this is so.⁸ But appellant's contention that Sec-

⁸ Appellant does argue briefly (Br. 33-35) that its orders to withhold are "analogous to a judgment creditors' garnishment" (Br. 33). But appellant's argument on this point is entirely directed to showing that its orders satisfy the requirements of due process, a point we do not dispute. None of the cases cited by appellant (Br. 34) addresses questions of sovereign immunity or the construction of a "sue and be sued" clause; rather, they suggest that appellant's orders to withhold resemble postjudgment garnishment for purposes of the Due Process Clause, or that it is a "plain, speedy and efficient

tion 401(1) authorizes its administrative levies is not supported by the language of the "sue and be sued" clause; by the interpretation this Court has historically given to similar clauses in other statutes; by the structure or legislative history of the PRA; or—as the courts below noted—by Congress's consistent treatment of problems arising from the collection of state income taxes from federal employees.

A. A "Sue And Be Sued" Clause Is Not An Undifferentiated Waiver Of Sovereign Immunity And Ordinarily Authorizes, At Most, Only Judicial Process And Its Incidents

1. Appellant and the amici begin with the premise that the "sue and be sued" clause of the PRA strips the Postal Service of sovereign immunity in all its forms and renders sovereign immunity irrelevant to the Postal Service's affairs. See, e.g., Appellant Br. 15-23; Am. Br. 2, 3.⁴ But a clause providing that an agency may "sue or be sued" does not say that the agency "shall have no sovereign immunity whatever." And this Court has never treated the "sue and be sued" clause, which is found in many statutes, as such a "ritualistic formula" (*Keifer & Keifer v. RFC*, 306 U.S. 381, 389 (1939)) that necessarily divests a federal instrumentality of all sovereign immunity.

In interpreting "sue and be sued" clauses, the Court has been sensitive to all indications of con-

remedy" under 28 U.S.C. 1341. See, e.g., *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975); *Randall v. Franchise Tax Board*, 453 F.2d 381, 382 (9th Cir. 1971); *Aronoff v. Franchise Tax Board*, 348 F.2d 9 (9th Cir. 1965).

⁴"Am. Br." refers to the brief of amici curiae Delaware, et al.

gressional intent—the language of the clause, its statutory context, and its legislative history. As the Court said in one of its first decisions interpreting such a clause, it “may have one significance in one context and a different signification in another” (*Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 275 (1913)). Indeed, in *Rosaly*, the Court held that because of “the nature of the Porto Rican government” (*id.* at 274), a clause providing that that government could “sue and be sued” was “[i]n a sense * * * redundant” and did not narrow its sovereign immunity at all (*id.* at 227). See also *Cheunning v. District of Columbia*, 119 F.2d 459 (D.C. Cir.), cert. denied, 314 U.S. 639 (1941) (“sue and be sued” clause does not authorize garnishment of the government of the District of Columbia).

In its next important decision interpreting such a clause, *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935), the Court ruled that a “sue and be sued” clause permitted a plaintiff suing a government instrumentality to use prejudgment attachment. But the Court reached this conclusion not because the “sue and be sued” clause waived sovereign immunity in all respects but because liability to prejudgment attachment was the “implication” to be drawn from the words of the clause and the “character” of the defendant, and because “it does not appear that the attachment would directly interfere with any function performed by [the defendant] as a federal instrumentality” (*id.* at 232-233, 234, 237). The Court expressly “reserve[d] the question whether a different result would be required if such an interference were shown” (*id.* at 237). The Court followed a similar approach in *RFC v. J.G. Menihan Corp.*, 312 U.S. 81 (1941), where it examined other statutes

governing the defendant federal instrumentality (*id.* at 83) and the language of the clause before concluding that "the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings" (*id.* at 85).

In *FHA v. Burr*, *supra*—the case on which appellant chiefly relies—the Court held that a statutory provision authorizing the Federal Housing Administration "to sue and be sued" permitted a creditor who had obtained a final judgment against employees of the FHA to garnish their wages. As we will explain, there are crucial differences between postjudgment garnishment pursuant to a judicial order and appellant's administrative levies. But in any event, the Court in *Burr*, unlike appellant, did not proceed from the premise that a "sue and be sued" clause is a blanket waiver of sovereign immunity in all its forms. Instead, the Court stated that "[s]ince consent to 'sue and be sued' has been given by Congress, the problem [is] * * * whether or not garnishment comes within the scope of that authorization" (309 U.S. at 244). The Court considered the nature of the FHA (*id.* at 245) before reaching its conclusion primarily on the basis of the language of the clause (*id.* at 245-246 (footnotes omitted)):

Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts.

* * * [G]arnishment is a well-known remedy available to suitors. To say that Congress did not intend to include such civil process in the words "sue and be sued" would in general deprive suits of some of their efficacy. Hence, in absence of special circumstances, we assume that

when Congress authorized federal instrumentalities of the type here involved to "sue and be sued" it used those words in their usual and ordinary sense.

Moreover, quite apart from attachment and garnishment, the Court in *Burr*—rather than treating a "sue and be sued" clause as an undifferentiated waiver of sovereign immunity—stated that even certain suits might be precluded if it were "clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme [or] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function" (309 U.S. at 245 (footnote omitted)). See also *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 277 (1959) ("[W]here a public instrumentality is created with a right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the * * * courts."); *White v. Bloomberg*, 501 F.2d 1379, 1386 (4th Cir 1974) ("A grant of authority [to the Postal Service] to sue and be sued constitutes at least a partial waiver of immunity * * *. The question * * * is the scope of that waiver.").

2. To the extent the phrase "sue and be sued" has an established meaning, it is the meaning suggested by the words themselves: an agency may be subject to a lawsuit, that is, to *judicial* proceedings. For example, in *Federal Land Bank v. Priddy*, *supra*, the Court said that the case involved the "[i]mmunity of corporate government agencies from suit and judicial process, and their incidents" (295 U.S. at 235). The Court described the "sue and be sued" clause as a "waiver of immunity from suit" and defined the

question before it as "whether liability to suit includes by implication judicial process of attachment and execution, which are usual incidents of suits against natural persons" (295 U.S. at 232). See also *id.* at 233 ("the intended scope of the liability to suit includes judicial process incident to suit").

Similarly, in *RFC v. J.G. Menihan Corp., supra*, the Court concluded that "the unqualified authority to sue and be sued placed [the government agency] upon an equal footing with private parties as to the usual incidents of suits" (312 U.S. at 85-86). The Court reasoned that "the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings" (*id.* at 85).

In *Burr*, as we have noted, the Court relied primarily on the "normal connotation" of "the words 'sue and be sued'" (309 U.S. at 245). The Court stated that "in absence of special circumstances, * * * when Congress authorized federal instrumentalities of the type here involved to 'sue and be sued' it used those words in their usual and ordinary sense" (309 U.S. at 246 (footnote omitted)). The "usual and ordinary sense" of the phrase, the Court explained, was identified by Chief Justice Marshall (*id.* at 246-247 n.8, quoting *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 448, 464 (1830)):

"The term ['suit'] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

The Court in *Burr* reasoned that postjudgment garnishment is "include[d] * * * in the words 'sue and be sued'" because it is "incident to" and "part and parcel" of a lawsuit (309 U.S. at 245-246). "[G]arnishment is a well-known remedy available to *suitors*" (*id.* at 246 (emphasis added)).⁵

Appellant's orders to withhold have no connection to any suit or to any "proceeding in a court of justice." Appellant's orders are not issued or approved by a court; they are neither the initiation nor the culmination of judicial proceedings; they can be issued without any court hearing or court order whatever. They are, it appears, final administrative orders that will give rise to a suit only if the taxpayer institutes a separate action seeking a refund. Their purpose is to facilitate the collection of taxes by an administrative agency, not to execute the judgment of a court or give a court the opportunity to exercise its jurisdiction. There is no basis for concluding that a clause that permits a federal instrumentality to be *sued*—that makes it, in the language of *Burr*, "amenable to judicial process" (309 U.S. at 245 (emphasis added))—also subjects it to such purely administrative process.

3. Another provision of the Postal Reorganization Act also suggests that when Congress permitted the Postal Service to "be sued," it envisioned only pro-

⁵ The court of appeals cases on which appellant relies adopt a comparable approach. See, e.g., *Beneficial Finance Co. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978) ("we see no proper alternative to literal interpretation of the 'sue and be sued' clause"); *General Electric Credit Corp. v. Smith*, 565 F.2d 291, 292 (4th Cir. 1977); *May Department Stores Co. v. Williamson*, 549 F.2d 1147, 1148 (8th Cir. 1977).

ceedings in court. Before the PRA was enacted, the Post Office Department could not be sued in its own name; by authorizing the Postal Service to "be sued" in Section 401(1), Congress created a new category of litigation. The jurisdictional provision of the PRA, 39 U.S.C. 409(a), suggests that when Congress did so, it envisioned litigation in court.

Section 409(a) provides, with an exception not relevant here, that:

[T]he United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of [28 U.S.C. (& Supp. V) 1441 *et seq.*].

Congress plainly intended that if the Postal Service wished, it could remove all suits against it and thereby be "sued" only in federal court. Since state agency proceedings cannot be removed to federal court (*Upshur County v. Rich*, 135 U.S. 467 (1890)), this is a further indication that Congress did not intend the Postal Service to be subjected to state agency proceedings. Cf. *Chicago, R.I. & P.R.R. v. Stude*, 346 U.S. 574 (1954). It is, moreover, unlikely that Congress, while enabling the Postal Service to defeat the jurisdiction of state courts by removing suits brought against it, intended to require the Postal Service to submit to the jurisdiction of state administrative agencies.

4. a. We submit that confining the "sue and be sued" clause of the PRA to judicial process is not an excessively literal or technical interpretation of the

clause.* Despite appellant's assertions to the contrary (Br. 7, 16-17), the general rule is that a waiver of sovereign immunity should be interpreted narrowly; it creates liability only to the extent that the government's consent to suit is "unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). "[L]imitations and conditions upon which the Government consents to be sued must be strictly observed." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). See also *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 143 n.2 (1971).

Moreover, the distinction between state courts and state administrative agencies is important for many purposes. In a context closely related to this case, the Court has held that the constitutionality of pre-judgment attachment depends in part on whether a judge—as opposed to an administrative official—has authorized the levy. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). See also *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 615-616 (1974). Considerations similar to those that were the basis of the Court's ruling would have justified Con-

* We note, to avoid any possible confusion, that we do not contend that sovereign immunity bars the instant proceeding. The instant proceeding—a suit against the Postal Service under Cal. Rev. & Tax. Code § 18818—is, in effect, an effort by appellant to impose a sanction on the Postal Service because it did not comply with appellant's administrative levy issued under Section 18817. Our submission is that, because of sovereign immunity, the Postal Service was not required to comply with the administrative levy. If our submission is correct, appellant should lose this enforcement proceeding on the merits, because the Postal Service's decision not to comply with the administrative levy was lawful and therefore cannot give rise to sanctions.

gress in concluding that its instrumentality should be subject only to decrees and orders issued by judges, not to state administrative orders. In other contexts, as well, Congress has not accorded the orders and proceedings of state administrative agencies the same weight as state judicial action. See, e.g., 28 U.S.C. 2283; *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552-556 (1972); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 469-472 & n.7 (1982). See also *Moore v. City of East Cleveland*, 431 U.S. 494, 524 n.2 (1977) (opinion of Burger, C.J.) (citation omitted) ("'state administrative agency determinations do not create res judicata or collateral estoppel effects'"). Cf. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281-283 (1980) (plurality opinion).

There is also good reason to believe that Congress did not intend its inclusion of a standard "sue and be sued" clause in the PRA to subject the Postal Service to every order requiring the payment of money that might be issued by any state, county, or municipal agency or official across the nation. Judicial process includes a relatively narrow class of orders that will generally be issued only in accordance with certain procedural safeguards. But if the Postal Service's waiver of immunity is not limited to judicial process, it is potentially very expansive and ill-defined. It would include virtually any order issued by any official of any unit of government.

"The Postal Service today is among the largest employers in the world" (*United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 122 (1981)). It is present in countless locales, and it is routinely the most visible federal installation in a community. Its operations bring it within the jurisdiction of state and local officials dealing

with landlord-tenant law, labor relations, zoning, building codes, traffic regulation, and many other subjects. It may become involved in disputes concerning the payment of money with its lessor, with an employee dissatisfied with the provisions of one of the Postal Service's nationwide collective bargaining agreements, or with many other individuals or local government agencies. Congress has explicitly provided a means by which such disputes can be resolved: the Postal Service may "be sued" in court, and if it does not prevail, it must pay any judgment entered against it.

But subjecting the Postal Service to administrative process unconnected to judicial proceedings will adversely affect its operations in significant ways that Congress could not have intended. If the Postal Service is not immune from state administrative orders requiring the payment of money, it will have to comply with every such order it receives—whether or not the order is lawful—or be subject to the sanctions for noncompliance that are specified by local law. For example, local ordinances governing disputes between a lessor and a lessee over the amount of rent due might provide that, upon the order of a local official, the lessee must pay the disputed amount or forfeit its claim (cf. *Lindsey v. Normet*, 405 U.S. 56 (1972)) and that the lessee can recover the sum only by exhausting administrative remedies prior to bringing an action in court. In such a case, the Postal Service's assets would be "diverted" (*Buchanan v. Alexander*, 45 U.S. (4 How.) at 20) from the objects designated by Congress, for an appreciable period of time, upon the order of a single municipal official. It is unlikely that Congress intended this to occur.

In addition, the defenses the Postal Service offers to such an order would be considered, in the first in-

stance, before a state or local agency; the Postal Service would then be enmeshed in whatever administrative proceedings are required by local law before it could gain access to court. The Postal Service's defenses in these circumstances will frequently involve the assertion of federal interests that are thought to preempt the local order (cf. *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981); *Stewart v. United States Postal Service*, 508 F. Supp. 112 (N.D. Cal. 1980)). It is most unlikely that Congress—which, as we noted, specifically provided a means for the Postal Service to remove to a federal forum actions brought against it in state *court*—considered state or local agencies an appropriate forum for the comparative weighing of federal and local interests.

Finally, if the Postal Service is not immune from state administrative orders, the Postal Service will have to bear the burden of initiating judicial proceedings to reclaim its assets, where that is the procedure specified by state law. As the Court has noted in a variety of contexts, this is not an insignificant burden. See, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. at 615-617 (distinguishing *Fuentes v. Shevin*, 407 U.S. 67 (1972)); *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965). The plain language of the statutory provision on which appellant relies shows that Congress did not intend to subject the Postal Service to this burden. Congress specified that disputes with the Postal Service are to be resolved by permitting the Postal Service to "be sued"—not by subjecting the Postal Service to an administrative fiat and then forcing it to sue to obtain relief.

b. It is true that appellant's orders to withhold are intended to obtain funds only from Postal Service

employees; in principle, they hold the Postal Service harmless. But the text of the "sue and be sued" clause does not appear to permit a principled distinction between this form of administrative order and an order directed at Postal Service assets. Moreover, administrative orders like appellant's are burdensome and disruptive in additional ways, because they can give rise to litigation between the Postal Service and the employee, or to a dispute between the state administrative agency and the employee in which the Postal Service is unavoidably implicated.

Postjudgment wage garnishment, however much hardship it inflicts on an employee, at least follows a full litigation. The employee will have had ample notice of his alleged debt; he will have had an opportunity to present his defenses; and both the existence and the amount of his liability will have been finally established. An administrative levy is different in each of these respects. It is likely to come as more of a surprise to the employee and to be more disruptive of his financial affairs. It is, presumably, more likely to be erroneous, and the amount is far more likely to be in dispute. The employee is less likely to have reconciled himself to it, and more likely to view the Postal Service as contributing to his difficulties.

For all of these reasons, administrative levies have far greater potential to disrupt the relationship between the Postal Service and its employee. Indeed, the employee may himself institute an action against the Postal Service, claiming that the levy is excessive or illegal. Thus, administrative levies create a significant danger that the Postal Service will find itself embroiled in—and spending federal funds on—a dispute between the employee and the state administrative agency in which it has no interest. Cf. *Snapp*

v. *United States Postal Service*, 664 F.2d 1329 (5th Cir. 1982); *Long Island Trust Co. v. United States Postal Service*, 647 F.2d 336 (2d Cir. 1981).⁷

Private commercial firms, of course, confront these problems. But the question is not whether the Postal Service, as an abstract proposition, is in some sense entitled to protections that private firms do not enjoy; it is whether Congress intended to deprive the Postal Service of protections that, in the absence of congressional action, all federal agencies enjoy.

Appellant's suggestion that Congress simply intended the Postal Service to be treated exactly as if it were a private corporation (Br. 19-22; see Am. Br. 4) is far too crude. Congress explicitly placed the

⁷ Prejudgment wage garnishment can create problems somewhat similar to those presented by administrative levies. But constitutional and statutory limits on prejudgment garnishment make it of limited utility to most creditors. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); 15 U.S.C. 1671 et seq. (applicable to both prejudgment and postjudgment garnishment). We also note that this Court has never held that a federal instrumentality must honor a prejudgment order requiring the garnishment of an employee's wages and has consistently ruled that a "sue and be sued" clause does not subject a federal agency to judicial process that would seriously interfere with the performance of its functions (see *Priddy*, 295 U.S. at 237; *Burr*, 309 U.S. at 245). Indeed, if prejudgment garnishment is not supervised by a court and does not have a sufficient nexus with judicial proceedings, it may not fall within the "sue and be sued" clause at all. Cf. *Lynch v. Household Finance Corp.*, 405 U.S. at 552-556.

Moreover, prejudgment garnishment is, by definition, accompanied by the initiation of a lawsuit. The employee is immediately a party to a proceeding in which his rights and liabilities will be finally adjudicated. As the Court has ruled in a closely related context, this is a significant safeguard, and it makes the procedure substantially less onerous for the employee. Compare *Mitchell*, 416 U.S. at 615-616, with *Fuentes, supra*.

Postal Service in "the executive branch of the Government of the United States" (39 U.S.C. 201).⁸ The Service is recognized to be immune from state and local taxation. Appellant lists attributes that the Postal Service shares with private corporations; there are many more attributes of the Postal Service that no private entity possesses.⁹

⁸ The legislative history describes the decision to establish the Postal Service as a government agency instead of a corporation as the principal "important improvement[]" over the legislation initially recommended (H.R. Rep. 91-1104, 91st Cong., 2d Sess. 6 (1970)). "The Postal Service is—first, last and always—a public service" (*id.* at 19). The Senate Committee stated: "[T]he Postal Service is in fact and shall be operated as a service to the American people, *not* as a business enterprise" (S. Rep. 91-912, 91st Cong., 2d Sess. 4 (1970) (emphasis added)).

⁹ For example, the Postal Service may enter into international agreements (39 U.S.C. 407 and 408) and may levy fines (39 U.S.C. 5206, 5403, and 5604). The Postal Service must comply with the Freedom of Information Act, 5 U.S.C. 552 (although it may take advantage of certain additional exemptions (see 39 U.S.C. 410(c) and 412)), the Privacy Act of 1974, 5 U.S.C. 552a, and the Government in the Sunshine Act, 5 U.S.C. 552b (39 U.S.C. (Supp. V) 410(b)(1)). Its operations are specifically protected by numerous criminal statutes (see 39 U.S.C. 410(b)(2)). Postal Service employees are "part of the civil service" (39 U.S.C. 1001(b)), are covered by the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* (39 U.S.C. 1005(c)), and are entitled to veterans' preferences (39 U.S.C. 1005(a)(2)). "Preference eligible" Postal Service employees must be provided the procedural protections of the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*, and all other employees also receive those protections unless collective bargaining agreements provide otherwise (see 39 U.S.C. 1005(a)(1) and (2)). Congress explicitly described Postal Service employees as "Federal employees" in determining that they would not have the right to strike (see H.R.

More important, it is clear that when Congress specified the kinds of *litigation* to which the Postal Service would be subjected, it viewed the Postal Service as a government agency, not a private body. Under 39 U.S.C. 409(c), for example, parties suing the Postal Service for torts must do so under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.* Thus, in tort actions, the Postal Service, unlike a private business, may not be held strictly liable (see 28 U.S.C. 2680(a)); may not be held liable for punitive damages (28 U.S.C. 2674); may take advantage of numerous exceptions from liability, including the exception for "discretionary function[s]" (28 U.S.C. 2680(h)); may require administrative notification of a claim (28 U.S.C. 2672); and, indeed, may not even be sued for claims arising out of its central activity, the carriage and transmission of mail (see 28 U.S.C. 2680(b)).

The PRA also provides that the Postal Service will be governed by the same procedural rules "relating to the service of process, venue, and limitations of time for bringing action" as are applicable to the United States, and that the provisions of the Federal Rules of Civil Procedure that are applicable to the United States "shall apply in like manner" to the Postal Service (39 U.S.C. 409(b)). As we have noted, the Postal Service may remove to federal court actions brought against it in state court (39 U.S.C. 409(a)). And the Department of Justice has the

Rep. 91-1104, at 14). Even in its "business" functions, the Postal Service, unlike a private firm, is subject to such statutes as the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.* and the Miller Act, 40 U.S.C. (& Supp. V) 270a *et seq.* (see 41 U.S.C. (Supp. V) 601(2); 39 U.S.C. 410(b)(4)(B)).

authority to represent the Postal Service in litigation (39 U.S.C. 409(d)). There is, accordingly, plainly no reason to assume that Congress intended the Postal Service to bear all the burdens of litigation that a private entity would confront.

B. Congress Has Chosen Other Means To Aid The States In Collecting Taxes From Federal Employees

On several occasions, Congress has addressed problems associated with the collection of state and local taxes from federal employees. Because of the large number of postal employees (675,000 nationwide), their geographical distribution, and the relatively rapid turnover in many postal jobs, the tax obligations and delinquencies of postal employees have been of particular concern to Congress.

Congress has permitted state taxing agencies to collect the taxes of federal employees, including postal employees, from the government agencies that employ them, under certain conditions. In particular, as the courts below emphasized, Congress has authorized the withholding of anticipated tax liabilities from government employees, including Postal Service employees. But Congress has never simply allowed state agencies to levy on the accrued wages of federal employees.

There is no basis for suggesting that Congress believed the "sue and be sued" clause of the Postal Reorganization Act would alter the specific statutory arrangements it had previously established for aiding the collection of state taxes. What evidence there is suggests that the "sue and be sued" clause was included in the PRA for reasons wholly unrelated to the tax debts of Postal Service employees. Moreover, subsequent to the passage of the PRA, Congress, in the course of addressing the problem of federal em-

ployees' local income tax delinquencies, revealed its understanding that the PRA had not subjected the Postal Service to the administrative orders of local taxing agencies.¹⁰

1.a. Federal employees first became liable for state and local income taxes in 1939. Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575 (codified at 4 U.S.C. 111). Although federal employees presumably began being delinquent in their taxes shortly thereafter, Congress did not enlist federal agencies in the collection of state taxes until 5 U.S.C. 5517 was enacted in 1952.

Section 5517 provides that if a state so requests, the Secretary of the Treasury shall enter into an agreement with it providing that all federal agencies shall withhold taxes from their employees to the extent specified by state law. As the courts below noted, however, it is clear that Section 5517, as interpreted by regulations and by the agreements entered pursuant to it, requires only the collection of anticipated tax liabilities, not delinquent tax liabilities. The agreement between the federal government and California provides (J.A. 3) :

3. Nothing in this agreement shall be deemed:

* * * * *

¹⁰ Appellants (Br. 23-24) and amici (Br. 3-4) emphasize the importance of taxation to state governments. Congress has recognized and accommodated this interest in a number of ways. See pages 26-33, *infra*. In addition, we note that the Postal Service, like other federal agencies, has regulations providing for the imposition of disciplinary sanctions, including dismissal, on employees who fail to pay state and local taxes. See 39 C.F.R. 447.11(b) and 447.26.

In any event, generalized assertions about the importance of collecting taxes to the states do not shed light on questions concerning the precise means Congress has prescribed for federal agencies to aid in their collection.

(b) to require collection by agencies of the United States of delinquent tax liabilities of Federal employees * * *.

Moreover, the agreement specifies that the federal government is not required to implement state withholding statutes through any "procedures which do not substantially conform to the usual fiscal practices of agencies of the United States" (J.A. 3-4). Anticipated California state income tax liabilities are withheld from Postal Service employees pursuant to Postal Service regulations that give effect to Section 5517 and this agreement. See USPS, *Financial Management Manual* § 431.1(a) (1978).

The "sue and be sued" clause of the Postal Reorganization Act took effect in 1971. In 1974, in response to widespread delinquencies among federal employees in the payment of local income taxes (see, e.g., S. Rep. 93-946, 93d Cong., 2d Sess. 2 (1974)), Congress enacted 5 U.S.C. 5520. Section 5520 parallels Section 5517; it authorizes the withholding of anticipated local income tax liabilities from federal employees' wages.

The bills that became Section 5520 were considered by the Post Office and Civil Service Committee of each House of Congress. These were the same committees that had considered the Postal Reorganization Act. Furthermore, the deliberations that led to Section 5520 were centrally concerned with the Postal Service. The Senate committee was informed, and specifically noted, that in New York City "[i]t was estimated * * * that 28,000 postal employees * * * owed the City about \$1 million" (S. Rep. 93-946 at 2). Representatives of local governments complained to the committees that postal employees' delinquencies were a particular problem. See, e.g., H.R. Rep. 93-

892, 93d Cong., 2d Sess. 3 (1974); *Withholding Federal Employees' Taxes Under City Ordinances: Hearing on H.R. 8660 Before the Subcomm. on Manpower and Civil Service of the House Comm. on Post Office and Civil Service*, 93d Cong., 1st Sess. 8, 9 (1973) (testimony of John J. Travers, Collector of Revenue, St. Louis, Missouri). The Postal Service, while not objecting to the proposed legislation, advised the committees of the administrative problems the legislation would create in view of the nature of the Postal Service's operations. See *id.* at 5; S. Rep. 93-946 at 3, 4-5; H.R. Rep. 93-892 at 11.

Congress determined that Section 5520 should apply to the Postal Service (see H.R. Rep. 93-892 at 6), and the statute explicitly so provides (5 U.S.C. 5520(c)(4)(C); see 39 U.S.C. 410(b)). But the committees directed the Secretary of the Treasury, in implementing Section 5520, to pay particular attention to the Postal Service's concerns. The House Committee explained (H.R. Rep. 93-892 at 5):

There was a great deal of discussion regarding the inclusion of the Postal Service in this bill. The Committee recognized that this legislation may create administrative problems for the Postal Service. To a degree unique among Government agencies, postal employees are dispersed among many thousands of installations, branches and substations throughout the country. * * *.

* * * It is the intent of the Committee that the Secretary of the Treasury, in negotiating withholding agreements with city officials as required by the bill, will work closely with the Postal Service to assure that the arrangements can be implemented by the Postal Service without undue hardship.

The Senate Committee similarly recognized the peculiar problems faced by the Postal Service. See S. Rep. 93-946 at 2.

b. Several aspects of the legislative history of Sections 5517 and 5520 are notable. First, the congressional committees that drafted the PRA, and included the "sue and be sued" clause, did not share appellant's understanding of that clause. As appellant itself recognizes, if appellant's interpretation of the "sue and be sued" clause is correct, Sections 5517 and 5520 are—in appellant's word—"superfluous" so far as the Postal Service is concerned (Br. 12 n.3). Under appellant's interpretation, the "sue and be sued" clause alone, without Section 5520, would authorize a local taxing authority to order the Postal Service to withhold anticipated tax liabilities from employees' wages, just as appellant asserts that it can order the withholding of delinquent California state taxes.¹¹ But the committees' deliberations were obviously based on the premise that without Section 5520 the Postal Service would not be required to comply with local withholding requirements. It is reasonable to conclude, therefore, that the committees responsible for the PRA did not believe that its "sue and be sued" clause required the Postal Service to honor the administrative orders of state taxing authorities. See *Bell v. New Jersey*, No. 81-2125 (May 31, 1983), slip op. 10-11.

¹¹ Indeed, Cal. Rev. & Tax. Code § 18817 itself appears to authorize appellant to issue "orders to withhold" not only to collect delinquent taxes but also to collect from an employer the anticipated tax liabilities of its employees, if the employer has erroneously failed to withhold those sums from the employees' compensation. See also Cal. Rev. & Tax. Code § 18815.

Second, when Congress addressed the problems arising from federal employees' failure to pay their state and local taxes, it chose to require withholding of anticipated liabilities. It did not supplement the withholding schemes established by Sections 5517 and 5520 with any provision for the collection of delinquent taxes by means of state administrative levies.

This choice is significant because the administrative burdens involved in the withholding of anticipated taxes are quite distinct from those created by efforts to collect delinquent tax liabilities. Amounts withheld for anticipated liabilities are determined according to a standard schedule. The agency generally need not make an individualized adjustment of the paychecks of particular employees. Moreover, the amount of an anticipated tax withholding liability is rarely controversial. Litigation over the withholding of anticipated taxes—unlike litigation over the collection of delinquent taxes—is virtually unknown. Even if excessive anticipated taxes are withheld, they will, of course, be refunded to the employee. In general, withholding of anticipated taxes is unlikely to cause a dispute between a federal agency and its employee, or a dispute between the employee and the taxing authority in which the agency becomes involved. In this respect, the withholding of anticipated tax liabilities bears some resemblance to postjudgment garnishment, which, as we explained (see page 21, *supra*), is less likely than an administrative order to precipitate a disruptive dispute.

We note in this regard that an administrative levy requiring the withholding of money to satisfy alleged delinquent tax liabilities has even more potential to give rise to a dispute than other administrative orders. This is because a tax levy can be imposed with-

out the process that normally must accompany garnishments and attachments. Compare *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976), and *Phillips v. Commissioner*, 283 U.S. 589 (1931), with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, *supra*. See *Fuentes v. Shevin*, 407 U.S. at 90-92 & n.24. A levy issued after summary or ex parte proceedings is presumably more likely to be erroneous and more likely to cause the employee to feel aggrieved. Congress has characteristically chosen the less potentially disruptive route of requiring withholding of anticipated liabilities, instead of authorizing state levies for delinquent taxes.

Finally, the congressional deliberations leading up to the enactment of Section 5520 were marked by a concern for the unique administrative difficulties faced by the Postal Service and the burdens that would be imposed on it. This is not surprising; the PRA, enacted shortly before Section 5520, was prompted by a desire to remedy the inefficiencies of the Post Office Department (see H.R. Rep. 91-1104, 91st Cong., 2d Sess. 4-6 (1970); S. Rep. 91-912, 91st Cong., 2d Sess. 2-3 (1970)), and Congress intended that the new Postal Service be a streamlined and efficient operation (see *Council of Greenburgh*, 453 U.S. at 122). It is unlikely that the committees that carefully considered whether to require the Postal Service to withhold anticipated local income taxes, and specified that the withholding program was to be administered in a way that took account of the Postal Service's concerns, meant—by enacting a standard “sue and be sued” clause—casually to subject the Postal Service to the potentially disruptive burden of executing state levies for delinquent taxes.

2. Congress has provided a specific means by which states can collect delinquent taxes by having sums

withheld from federal employees' wages. Appellant, however, has not made use of this mechanism. Under the "piggyback" enforcement provisions of the Internal Revenue Code, 26 U.S.C. 6361 *et seq.*, a state may enter into an agreement under which the Internal Revenue Service will collect the state's individual income taxes. The IRS can levy on the wages of federal employees (see 26 U.S.C. 6331), and it can use this enforcement device on behalf of a state under the piggyback provisions (see 26 U.S.C. 6361(a)).

When Congress enacted the piggyback provisions, it was acutely conscious of the potential administrative costs that might be imposed on the federal government if it became involved in the collection of state taxes. See H.R. Rep. 92-1018, 92d Cong., 2d Sess., Pt. 1, at 47, 51, 59, 67-68 (1972), S. Rep. 92-1050, 92d Cong., 2d Sess., Pt. 1, at 43, 44, 47, 55, 64 (1972). As a result, Congress specified criteria that a state income tax must meet in order to qualify for the piggyback provisions. See 26 U.S.C. 6362. Moreover, Congress provided that state taxpayers subject to levies under the piggyback provisions would be entitled to the same procedural protections as federal taxpayers, including the right to sue for a refund in federal court, notwithstanding the laws of the state. See 26 U.S.C. 6361(b).

These provisions further demonstrate that Congress does not casually allow state agencies to levy on federal employees' compensation. When Congress chose to permit such levies, it carefully specified the circumstances in which state taxes would be collected, and the procedures that were to be used in their collection, in order to reduce the associated administrative burdens. If California were to meet the appropriate specifications and enter into an agreement

under the piggyback provisions, it could take advantage of IRS levies against all federal employees, not just Postal Service employees. But Congress's decision to provide a specific, detailed scheme under which federal agencies could be enlisted in the collection of state income taxes is further evidence that Congress did not intend the general "sue and be sued" clause to constitute an open invitation to state taxing authorities to subject a federal instrumentality to whatever enforcement procedures state law happens to provide.

3. In the final analysis, the defect in appellant's position is that it reads too much into a standard, almost boilerplate provision—the "sue and be sued" clause—that Congress enacted unreflectively and, in all likelihood, for reasons that had nothing to do with Postal Service employees' state tax liabilities. "Sue and be sued" clauses are, of course, very common; Congress routinely includes them in statutes when it wishes to give a federal instrumentality some degree of financial autonomy. See generally *First National City Bank v. Banco para el Comercio Exterior de Cuba*, No. 81-984 (June 17, 1983), slip op. 12-14; *Keifer & Keifer*, 306 U.S. at 390 & n.3.

In general, the purpose of a "sue and be sued" clause is, as this Court has recently recognized, to "enabl[e] third parties to deal with the instrumentality knowing that they may seek relief in the courts" (*First National City Bank*, slip op. 14 (footnote omitted); see also *Merchant Fleet Corp. v. Harwood*, 281 U.S. 519, 525 (1930)). Congress gave virtually no independent consideration to the "sue and be sued" clause of the PRA,¹² and there is every

¹² The provision that became 39 U.S.C. 401 appeared in essentially the same form at every stage of the consideration of the proposed legislation that became the PRA. See *Postal*

reason to believe that it was intended to serve this same purpose. This purpose is, of course, completely unrelated to the summary collection of Postal Service employees' tax debts. By contrast, Congress has given careful independent consideration to the problems of collecting state and local taxes from federal employees—Postal Service employees in particular—and has been concerned not to impose undue burdens on the Postal Service. In this context, it would be inconsistent with Congress's intentions to interpret the "sue and be sued" clause to permit a form of state administrative tax levy to which federal agencies are not ordinarily subject.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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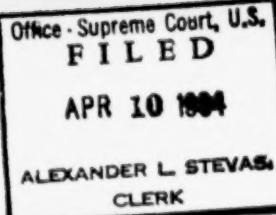
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Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 1st Sess., Pt. 1, at 31 (1969) (proposed 39 U.S.C. 2126); id. at 101 (proposed 39 U.S.C. 205). It appears to have been given little detailed consideration by the committees. See, e.g., H.R. Rep. 91-1104 at 9, 25.



No. 83-372

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES POSTAL SERVICE,
Appellee.

On Appeal From the United States
Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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REPLY BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

ARGUMENT.

I.

THE POSTAL SERVICE IS ESTOPPED TO ARGUE THAT THE SUE AND BE SUED CLAUSE DOES NOT AUTHORIZE THE BOARD'S ADMINISTRATIVE LEVY.

The Postal Service devotes most of its brief (Appellee's Brief, pp. 8-25) to its argument that 39 U.S.C. § 401(1) did not waive the sovereign immunity of the Postal Service with regard to State tax garnishments. This is even though the Ninth Circuit opinion below found that the sovereign immunity of the Postal Service has been waived "clearly and unambiguously" by Section 401(1). (*Employment Development Dept. v. U.S. Postal Service* (9th Cir. 1981) 698 F.2d 1029, 1032.) The Ninth Circuit found that the tax garnishment of the Employment Development Department

(EDD) should have been honored (*Id.* at 1034), but that the tax garnishment of the Franchise Tax Board (the Board) was precluded by 5 U.S.C. § 5517. (*Id.* at 1035.) The Postal Service did not seek further review of the EDD portion of the decision and pursuant to the principles articulated by this Court in *Montana v. United States* (1979) 440 U.S. 147, the Postal Service should be estopped from relitigating the issue of sovereign immunity as it applies to a taxing agency's garnishment.

As this Court stated in *Montana v. United States, supra*, 440 U.S. 147, "[U]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." (*Id.* at 153.)

The Board originally filed this action to enforce an administrative levy (garnishment) which the United States Postal Service (Postal Service) refused to honor. (J.A. 8-44.) In a companion case, the EDD also filed an action to enforce an administrative levy which the Postal Service refused to honor. (A. 2.)

The Ninth Circuit held that the garnishment of the EDD should be honored, but that the garnishment of the Board was preempted by 5 U.S.C. § 5517. (*Employment Development Dept. v. U.S. Postal Service (supra)*, 698 F.2d 1029, 1034-35.) The Ninth Circuit apparently concluded that both administrative levies were authorized by 39 U.S.C. § 401(1), the "sue and be sued" clause. (*Id.* at 1032.)

The Ninth Circuit stated, "[A]t issue is whether California state agencies may use California summary tax collection procedures to reach funds in the hands of the United States Postal Service." (*Id.* at 1031.)

The Ninth Circuit also stated:

"The Postal Service does not contend that it is immune from all suits, for § 401(1) of the Postal Reorganization Act clearly and unambiguously waives sovereign immunity by providing that the Service 'may sue and be sued.' See generally *FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940).'" (Footnote omitted.) (*Id.* at 1032.)

Finally the Ninth Circuit relied on four of the Circuit Courts of Appeals decisions which had allowed the garnishment of Postal Service funds. These cases, *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147 and *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, all held that the Postal Service is not immune from state garnishment or other related proceedings.

The present action is reminiscent of the continuing litigation in the various Courts of Appeals wherein the Postal Service continued to argue that 39 U.S.C. § 401(1) did not waive the sovereign immunity of the Postal Service and did not authorize a garnishment of its employees' wages or payments to its contractors. The Postal Service lost this issue in the 2nd, 3rd, 4th, 5th, 7th, 8th and 10th Circuits and never sought further review from this Court.¹ The Postal Service now admits that wage garnishments from ordinary judgment creditors should be honored, but again falls back on its sovereign immunity defense to argue that the Board's garnishment should not be honored because it is not based on a judgment.

¹This pattern of relitigating the question of sovereign immunity in each circuit and then never seeking review from this Court prompted two separate Court of Appeals Judges to criticize the Postal Service. See, e.g., Judge Lay in *May Dept. Stores Co. v. Williamson* (*supra*), 549 F.2d 1147, 1149-1150; and Judge Weis in *Goodman's Furniture v. United States Postal Serv.* (1977) 561 F.2d 462, 465-466.

The Postal Service has already litigated this question and lost in the EDD portion of the case. It did not ask this Court to reverse that adverse judgment; thus it is now estopped to continue to make that argument.

In addition, by not seeking further review of the EDD portion of the case, the Postal Service has conceded that it would be required to honor EDD garnishments and that sovereign immunity has been waived to that extent. Also, under the authority of the Ninth Circuit opinion, the Postal Service will be required to honor future garnishments of EDD. If the Postal Service prevails in this case that it does not have to honor the Board's garnishment, would it not follow that where two taxing agencies are attempting to collect delinquent taxes, one agency's garnishment will be honored (EDD's) and one agency's garnishment will be denied (Franchise Tax Board's)?

II.

THE SOVEREIGN IMMUNITY OF THE POSTAL SERVICE HAS BEEN WAIVED AS TO GARNISHMENTS.

Introduction.

The Postal Service spends a great deal of time arguing that the Postal Service's immunity has not been totally waived. (Appellee's Brief, pp. 10-25.) It may be that Congress never gave the Postal Service any immunity (See *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, 388-389), or it may be that any immunity has been significantly waived, but the Court need not address those issues in order to find for the Board. For the Board to prevail, this Court only needs to find that the Board's garnishment has equal dignity to the garnishment of an ordinary judgment creditor.

The case law is clear and the Postal Service admits that § 401(1) authorizes a garnishment against the Postal Service. Thus, there is no dispute that the sovereign immunity has been waived at least to that extent. The only issue which this Court needs to address therefore, is whether the Board's garnishment is the type of garnishment which must be honored.

A. The Doctrine of Sovereign Immunity Is Not Favored and It Should Not Be Used to Interfere With a State's Attempt to Collect Its Taxes.

The Postal Service argues for a technical, restricted interpretation of § 401(1).² If this interpretation is accepted, the Franchise Tax Board may never collect tax revenue from certain Postal Service employees. The Board submits that the concept of sovereign immunity has become more disfavored over the last 45 years and that it should not be revitalized in this case to interfere with an activity as important as the collection of taxes.

This Court has held numerous times that the doctrine of sovereign immunity is not favored. *National Bank v. Republic of China* (1954) 348 U.S. 356, 359 ("But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."); *FHA v. Burr* (1939) 309 U.S. 242, 245 ("This policy [of liberally construing waiver of governmental immunity with regard to federal instrumentalities] is in line with the current disfavor of the doctrine of govern-

²The Postal Service quotes selected portions of the *Burr*, *Menihan* and *Keifer* opinions. However, these cases are not helpful to the Postal Service. A review of these decisions indicates that this Court found in all cases that there was no sovereign immunity.

mental immunity from suit . . ."); *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, 392 (". . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . ."; see also, *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 203 ("We also note that the widespread dissatisfaction over the doctrine of sovereign immunity has continued unabated.").

In addition, various legal writers have expressed displeasure with the concept. See Cramton, "Nonstatutory Review Of Federal Administrative Action: The Need For Statutory Reform Of Sovereign Immunity, Subject Matter Jurisdiction, And Parties Defendant," 68 Mich. L. Rev. 387 (1970).

As Professor Cramton said, "[I]f problems related to sovereign immunity arose infrequently, it would be possible to regard the defects and wastefulness of the doctrine with a degree of equanimity. The litigating practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year." (*Id.* at 420.)

Professor Cramton also noted, "[N]o scholar so far as can be ascertained, has had a good word for sovereign immunity for many years." (*Id.* at 419; see also, Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479 (1962); Currie, "The Federal Courts and The American Law Institute," Part II, 36 U. Chi. L. Rev. 268, 290 (1969).³

³In *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, the Seventh Circuit collects numerous additional authorities who criticize the concept of sovereign immunity. (*Id.* at 203-204.)

B. The Sue and Be Sued Clause Should Be Broadly Construed.

The Franchise Tax Board has argued that sovereign immunity should be liberally construed (Appellant's Brief, p. 17) while the Postal Service has argued that it should be narrowly construed. (Appellee's Brief, p. 17.) The cases relied upon by the Postal Service deal with the sovereign immunity of the United States rather than with a federal agency. It is clear that a waiver of governmental immunity of a federal instrumentality should be *liberally construed*. (*R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84; *FHA v. Burr* (1940) 309 U.S. 242, 245; *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *United States v. Shaw* (1939) 309 U.S. 495, 501 ("Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed."); see also Hart and Wechsler, *The Federal Courts and The Federal System* (2nd Ed., 1973) p. 1351.

The Postal Service is a "business-like enterprise," which is "quite unlike that of any other agency." Letter from U.S. Postal Service Law Department to the Honorable Gale W. McGee, Chairman, Committee on Post Office and Civil Service, U.S. Senate, reprinted in 1974 U.S. Code Cong. and Admin. News, 3450, 3453. Thus, the waiver of the immunity of this "business-like enterprise" should be liberally construed.

III.

**THIS CASE DEALS SOLELY WITH WAGE GARNISHMENTS.
IT HAS NO BEARING ON ADMINISTRATIVE AGENCIES
IN GENERAL.**

The Postal Service conjures a "parade of horribles" to support its position that the Board's garnishment should not be honored. The Service contends that if the Board is al-

lowed to garnish the wages of Postal Service employees then any official of any government unit across the nation "could order the Postal Service to pay over a sum of money" (Appellee's Brief, p. 6), and that if the Postal Service's waiver of immunity is not limited to judicial process it would include "any order issued by any official of any unit of government" (Appellee's Brief, p. 18).

This is objectionable for several reasons. The Board is not contending that the Postal Service is amenable to all administrative agencies and a decision in favor of the Board would not lead to that result. The Board is merely arguing that § 401(1) *authorizes* wage garnishments of Postal Service employees and that the Board has a wage garnishment which therefore should be honored. Other administrative agencies would not be affected by this decision unless they had obtained a *wage garnishment*.

When an ordinary judgment creditor garnishes the wages of a Postal Service employee, this requires the Postal Service to pay the money. By statute the Board has the same attributes as a judgment creditor with the same rights. The Postal Service only has the obligations to the Board that it would have as to any other judgment creditor. It is incorrect to argue that the Postal Service would then become subject to "any order issued by any official of any unit of government."

Over forty years ago this Court found that a "sue and be sued" clause waived the sovereign immunity of a federal instrumentality at least to the extent that it must honor a wage garnishment against its employee. (*FHA v. Burr* (1940) 309 U.S. 242.) Following the teaching of *Burr*, seven separate Circuit Courts of Appeals (discussed in Appellant's Brief at p. 17) have found that Section 401(1), the "sue and be sued" clause, authorizes garnishment of wages of Postal Service employees or payments to contractors. A decision in favor of the Board would follow this Court's

holding in *Burr* and as applied by the seven Circuit Courts of Appeals. Those cases have held that "sue and be sued" includes garnishment.

Numerous Courts have held that final tax assessments are given the force of a judgment (Appellant's Brief, p. 34), and that the Board's garnishment is "like post-judgment execution." (*Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382.) The Board's garnishment is as valid as the garnishment of an ordinary judgment creditor. In fact, in order to facilitate the collection of taxes, the Board's garnishment should be more readily accepted.

A brief diagram will indicate the relationship of the Board to the taxpayer and the Postal Service and compare it to the relationship among an ordinary creditor, an ordinary debtor and the Postal Service.

1. *Franchise Tax Board*

(FTB Assessment)

- a. FTB _____ or _____ Taxpayer
(Taxpayer Self Assessed)
- b. Final assessment is equivalent to a judgment.
- c. FTB _____ (GARNISHES) _____ Postal Service
- d. FTB _____ (SUES) _____ Postal Service
(If garnishment not honored)

2. *Ordinary Judgment Creditor*

- a. Creditor _____ (SUES) _____ Debtor
- b. Obtains Judgment
- c. Judgment Creditor (GARNISHES) Postal Service
- d. Judgment Creditor (SUES) Postal Service
(If garnishment not honored)

This diagram is helpful for several reasons. First it shows how the Board goes through the equivalent steps of a judgment creditor and how "any official of any unit of government" would not follow the same procedures and thus could not require the Postal Service to pay over money, exhaust its administrative remedies, litigate to get its property back, etc. (Appellee's Brief, pp. 18-20.) Second, it shows that the garnishment step fits into both systems in the same manner and since the Postal Service now concedes that "sue and be sued" includes garnishment, there is no reason why the Board's garnishment should not be honored.

In fact, the other administrative agencies to which the Postal Service refers do not have garnishments and thus cannot rely on the authority of *Burr* or the seven Circuit opinions. Thus, it is clear that any Postal Service discussion of other administrative agencies is totally irrelevant to this case and should be disregarded.

IV.

THE BOARD'S WAGE GARNISHMENTS ARE NOT MORE BURDENOME THAN CURRENT WITHHOLDING.

The Postal Service argues that garnishment procedures are more burdensome and disruptive than the withholding of current taxes. (Appellee's Brief, pp. 21, 31.) The Postal Service cites no authority for its assertion and in fact is incorrect. The Board contends that withholding (to which the Postal Service freely acquiesces) can create a conflict and that garnishment would not create an unreasonable burden. For example, the experience of the Franchise Tax Board has shown that increasing numbers of taxpayers are attempting to prevent the withholding of any amount of taxes from their paycheck. To accomplish this, they frequently exaggerate the number of exemptions they have or overestimate their deductions on their "W-4" form. Some even claim complete exemption from withholding.

This occurs on the national as well as state level and to deal with this problem, the Internal Revenue Service has instituted certain procedures. Where a taxpayer claims over 14 exemptions on his W-4, the employer must notify the Internal Revenue Service. (I.R.C. Reg. § 31.3402(f)(2)-1(g)(1).) The Internal Revenue Service may then notify the employer to disregard the W-4 filed by the taxpayer and to calculate the withholding based upon its determination. (I.R.C. § 31.3402(f)(2)-1(g)(5).) The Franchise Tax Board follows the same procedures and when the Internal Revenue Service disregards the W-4 of a California taxpayer, the Franchise Tax Board does likewise.

Thus, the taxpayer may institute a dispute involving the Franchise Tax Board, the Internal Revenue Service and the Postal Service as to the amount of tax which should be withheld. Nevertheless, Congress has specifically provided that federal agencies must comply with state and local withholding laws and procedures even though this is not a conflict-free situation for the Postal Service.

The Postal Service also argues that the Board's wage garnishment is more troublesome because it does not follow full litigation, the taxpayer may be surprised and the amount is more likely to be in dispute. (Appellee's Brief, p. 21.) Again, these assertions are erroneous.

As the Board discussed in detail in its brief (Appellant's Brief, pp. 31-32), a California taxpayer has ample notice of any tax deficiency assessed against him. He has the opportunity to meet with the Franchise Tax Board officials and to present any evidence which he feels supports his case. Thus, it is completely erroneous to contend that he will be surprised by the garnishment.

In addition, many tax liabilities are completely self-assessed. The taxpayer may admit he owes a certain amount

of money when he files a tax return but then does not remit the tax payment for whatever reason. It is clear that in this instance, the taxpayer will not be surprised and the amount could hardly be in dispute.

The Postal Service's argument also presumes, without any authority, that judgment debtors against whom someone has obtained a judgment will not be surprised and will not dispute the amount or validity of the judgment. This is simply not the case. These judgment debtors are just as likely to dispute their liability as are the Board's debtors,⁴ yet the Postal Service admits it will honor the garnishment in the first case but not the second. Again, there is no logic in this position.

The Postal Service argues that if it honors the Board's garnishment the employee (taxpayer) may institute an action against the Postal Service. (Appellee's Brief, p. 21.) However, as the Board has discussed, the mere act of obtaining a judicial garnishment does not foreclose disputes over the underlying judgment. It follows that the ordinary judgment debtor and the tax debtor are equally likely or unlikely to institute an action against the Postal Service.

V.

CONGRESS IS CONCERNED WITH THE FISCAL OPERATIONS OF THE STATES.

Congress has recognized the importance of not interfering with a State's right to manage its fiscal affairs. By enacting 28 U.S.C. § 1341, Congress has provided that no district court shall enjoin the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be obtained in the State courts. In several recent

⁴In some cases the Board's debtors may be less likely to dispute the liability, for example, where the tax liability has been self-assessed.

cases interpreting that statute, and in cases relying on the principle of comity, this Court has repeatedly protected the integrity of the States' taxing systems and held that the federal courts shall not interfere with a State's ability to collect its taxes. (See *California v. Grace Brethren Church* (1982) 457 U.S. 393, 411; *Fair Assessment In Real Estate v. McNary* (1981) 454 U.S. 100, 107; *Rosewell v. La Salle National Bank* (1981) 450 U.S. 503, 522; *Tully v. Griffin, Inc.* (1976) 429 U.S. 68, 73; *Great Lakes v. Huffman* (1943) 319 U.S. 293, 298.)

This Court has frequently articulated its concern for the States' ability to collect their taxes. See *California v. Grace Brethren Church* (*supra*), 457 U.S. 393, 410, n. 23. ("This Court has long recognized the dangers inherent in disrupting the administration of state tax systems."); *Fair Assessment In Real Estate v. McNary* (*supra*), 454 U.S. 100, 102 ("This Court, even before the enactment of § 1983, recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems."). Finally, both the *Fair Assessment* and *Grace Brethren* decisions cite the passage from *Dows v. City of Chicago* (1871) 11 Wall. 108, 110 which states:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public." *Fair Assessment, supra*, 454 U.S. 100, 102; *Grace Brethren, supra*, 457 U.S. 393, 410-411, n. 23.

The Board contends that the policy reasons given for not allowing a federal court to interfere with the collection of

a State tax have equal application to this case. In light of Congress' concern with the States' ability to collect their taxes, Congress could not have intended that Section 401(1) would waive the immunity of the Postal Service as to some garnishment procedures while denying the Franchise Tax Board the right to garnish the same wages.

VI.

THE POSTAL SERVICE IS MORE INDEPENDENT THAN MOST GOVERNMENT AGENCIES.

The Postal Service tries to align itself closely to the "government." However, when Congress created the Postal Service, it created an entity different from that previously known. 39 U.S.C. § 201 provides that it is "an independent establishment of the executive branch of the Government . . ." It is not an "executive department" as defined by 5 U.S.C. § 101; nor a "military department" (5 U.S.C. § 102); nor a government corporation (5 U.S.C. § 103). It is specifically excluded from the definition of "independent establishment" under 5 U.S.C. § 104, and thus it is presumably not an "executive agency" (5 U.S.C. § 105). One court tried to determine what "independent establishment" meant and finally concluded "that Congress intended the Postal Service to have greater independence than that of other independent establishments." (*Milner v. Bolger* (E.D. Calif. 1982) 546 F.Supp. 375, 378, n. 2.)

VII.

SECTION 5517 WAS ENACTED TO COOPERATE WITH THE STATES.

The Postal Service does not address the contention asserted by the Board in its brief that Congress could not have intended for the Board to forfeit its right to garnish the wages of Postal Service employees when it signed the § 5517 Agreement. (Appellant's Brief, p. 13.) Rather, the Postal

Service relies on 5 U.S.C. § 5520 which has no relevance to the Board's argument. (Appellee's Brief, pp. 27-31.)

The legislative history of 5 U.S.C. § 5517 indicates that Congress wanted to cooperate with the States in the collection of both current and delinquent taxes. When considering the legislation which became Section 5517, the Committee on Finance in the Senate stated, “[I]t is the policy of the Federal Government to cooperate with the States in the *administration of their tax laws* to the fullest extent practicable. To further this objective, your committee has approved Section 1999, authorizing Federal agencies to withhold State income taxes.” (Emphasis added.) Sen. Rept. No. 1309 reprinted in 1952 U.S. Code Cong. and Admin. News, p. 2360. The Board submits that the “*administration of their tax laws*” includes both current withholding and garnishment and that Congress never intended Section 5517 to interfere with the Board's garnishment procedures.

VIII.

THE PIGGYBACK ENFORCEMENT PROVISIONS DEMONSTRATE A CONGRESSIONAL INTENT TO EXPAND STATE TAX COLLECTION REMEDIES.

The Postal Service argues that the “piggyback” enforcement provisions of the Internal Revenue Code, 26 U.S.C. § 6361, *et seq.*, demonstrate an overall Congressional policy with regard to the States' collection of delinquent tax liabilities. (Appellee's Brief, pp. 31-33.) It is difficult to view these provisions as an expression of limitation when Congress has made available, at the option of each state, all of the summary tax collection procedures utilized by the Internal Revenue Service. This can only be characterized as a Congressional expansion of state remedies considering that the Internal Revenue Service is authorized to collect delinquent state taxes by way of administrative levy on the wages of *all* federal employees. If the “piggyback” provisions of

the Internal Revenue Code demonstrate a pattern of Congressional action, such pattern is one of federal legislative consistency in recognizing and enhancing summary tax collection procedures for the benefit of every state.

Conclusion.

The doctrine of sovereign immunity has been soundly criticized by many scholars and courts and it should not be given new life in this case which deals with the collection of a tax from a Postal Service employee.

There is no longer any dispute that 39 U.S.C. § 401(1) includes garnishment. A reasonable construction supports the Board's contention that Section 401(1) also includes the Board's garnishment.

The Board has shown that a decision in its favor will not open the floodgates and allow *any* administrative agency to demand payment or action from the Postal Service. The Board has the attributes of a judgment creditor and is entitled to have its garnishment respected.

Congress enacted 5 U.S.C. § 5517 to cooperate with the States in collecting their tax. Congress could not have intended to make the Board choose between withholding current payments from a Postal Service employee and garnishing his wages to collect delinquent taxes.

Congress has tried to facilitate the collection of State taxes. There can be no public policy served by the Postal Service interfering with the collection of those taxes.

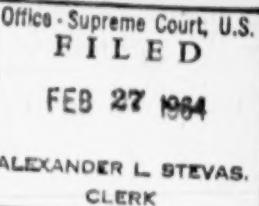
For these reasons, the Franchise Tax Board respectfully contends that the Decision of the Ninth Circuit Court of Appeals below should be reversed.

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No. 83-372
IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant.

vs.

UNITED STATES POSTAL SERVICE,
Appellee.

On Appeal From the United States Court of
Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE, STATES OF
DELAWARE, MARYLAND, MINNESOTA,
OREGON and PENNSYLVANIA
IN SUPPORT OF APPELLANT.

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BRIEF OF AMICI CURIAE, STATES OF DELAWARE, MARYLAND, MINNESOTA, OREGON and PENNSYLVANIA IN SUPPORT OF APPELLANT.

Statement of Interest.

The United States Postal Service challenges the right of the State of California to use its statutory tax garnishment remedies in the collection of its lawful revenue. The U.S. Postal Service contends that it is immune from the State's tax levy because it is required only to withhold current state taxes from the wages of its employees.

The *Amici* are vitally concerned with the ability of the states to administer their taxes in a reasonable and even-handed manner within the framework of our federal system. It is believed that this objective has been frustrated by the Ninth Circuit's decision below. The circuit court construed a federal statute to prohibit states from levying upon the wages of Postal Service employees even though no federal

legislation requires this result.

The *Amici* believe the Ninth Circuit erred in its decision. Statutory tax levies and or statutory judgments are appropriate vehicles for each state to utilize in order to secure payment of delinquent tax debts from employees of the U.S. Postal Service. The interest of the *Amici* in this appeal therefore parallels that of the appellant, the Franchise Tax Board.

Summary of Argument.

The sovereign immunity of the U.S. Postal Service was waived unequivocally with the passage of the Postal Reorganization Act of 1970 (Act of Aug. 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, codified at 39 U.S.C. §§ 101, *et seq.*). Such waiver should not be disturbed by reliance upon an unrelated federal statute (5 U.S.C. § 5517) in contravention of the federal policy of cooperation with the various states in the collection of their revenue.

ARGUMENT.

I.

The U.S. Postal Service Is Not Immune From State Tax Collection Levies.

In the Postal Reorganization Act, Congress waived Postal Service immunity, without qualification or limitation, by providing that the Service can "sue or be sued" like a private employer. 39 U.S.C. section 401. See *FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940). Section 401 has consistently been held by federal courts as a waiver of Postal Service immunity from state garnishment proceedings. *Assoc. Financial Services of America v. Robinson*, 582 F.2d 1 (5th Cir. 1978) (per curiam); *Beneficial Finance Co. of New York, Inc. v. Dallas*, 571 F.2d 125 (2d Cir. 1978); *General Elec. Credit Corp. v. Smith*, 565 F.2d 291 (4th Cir. 1977) (per curiam); *Goodman's Furniture v. United States Postal Service*, 561 F.2d 462 (3d Cir. 1977) (per curiam); *May Dept. Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Div., American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975) (per curiam). Cf. *Snapp v. U.S. Postal Service-Texarkana, etc.*, 664 F.2d 1329 (5th Cir. 1982) (rejecting attempt by Postal Service employee to enjoin wage garnishment).

Even the majority of the Ninth Circuit in the consolidated companion case below, found waiver of Postal Service immunity when it said: "The Postal Service does not contend that it is immune from all suits, for § 401(1) of the Postal Reorganization Act clearly and unambiguously waives sovereign immunity by providing that the Service 'may sue or be sued.' " *Employment Development Department v. U.S. Postal Service*, 698 F.2d 1029, 1032 (9th Cir. 1983).

In conjunction with the waiver of its immunity, the U.S. Postal Service should recognize that each state has a vital

interest in collecting taxes from its taxpayers, “[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need.” *Bull v. United States* (1935) 295 U.S. 247, 261 (1935); Accord *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350 (1977). A state’s levy for taxes is simply a means by which each state secures to itself “the lifeblood of government.” To restrict such lifeblood should not be tolerated in the absence of specific unequivocal legislation by Congress — which is clearly absent in this case. Any infringement upon a state’s power to collect its lawful revenue goes against established federal policy and must be closely scrutinized in order that the *State’s* sovereign power to tax is respected.

As the intent of the Postal Reorganization Act was to remove sovereign immunity from the U.S. Postal Service, it should be treated like any private business corporation for civil purposes. Such a principle is clear in the statutes and supported by the numerous cases cited in appellant’s brief as the majority rule.

II.

The Ninth Circuit’s Application of 5 U.S.C. Section 5517 Was Erroneous.

The Ninth Circuit below “excused” the Postal Service from honoring the appellant’s statutory levy for taxes. Its decision was based upon 5 U.S.C. section 5517¹ and the

¹5 U.S.C. § 5517 provides in pertinent part:

“(a) When a State statute—

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

agreement between state and federal authorities which implemented section 5517 (31 C.F.R. 215.12). The court determined that the Postal Service was immune from appellant's tax garnishments because its duty to the State was limited solely to the withholding of current taxes from the wages of its employees.

Such determination was erroneous. By the enactment of 5 U.S.C. section 5517, Congress simply provided for a state income tax prepayment plan, to wit; the withholding of certain amounts which may or may not be due as a tax from a federal employee at the conclusion of that employee's current tax year.

The language of section 5517 and its legislative history demonstrate that the statute was intended to be and, in fact, is limited to the withholding of current anticipatory tax liabilities. The House of Representatives Committee on Ways and Means noted that:

It is the view of your committee that every practical step should be taken to *cooperate in the area of withholding with the State and Territorial governments* in view of their cooperation with the Federal Government in fiscal matters generally . . . the Treasury Department indicated that it strongly supports Federal co-

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made.

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section.

"(c) . . ."

operation with States which utilize employer withholding of taxes in the administration of their income tax as a logical development in Federal-State fiscal cooperation. (Emphasis added.)

2 U.S. Code Cong. & Adm. News, p. 2434 (1952).

By its own terms and as supported by its legislative history, 5 U.S.C. section 5517 is a limited waiver of sovereign immunity, applicable to *all* federal agencies. It has one purpose: to let each state utilize a prepayment scheme for the remittance of anticipatory state taxes of federal employees. It neither prohibits nor permits wage garnishment of delinquent tax liabilities. It is *not* a congressional limitation on the complete waiver of sovereign immunity of the U.S. Postal Service, as determined by 39 U.S.C. section 401(1).

Accordingly, the Postal Service should recognize the laws of the state in which it operates. As with any employer, if the withholding of current taxes is required, it should so withhold. Contemporaneously, if state law requires an employer to transmit a delinquent debtor-employee's property to the taxing authority, the Postal Service should also honor such requirement.

In this manner, 5 U.S.C. section 5517 and 39 U.S.C. section 401 can be interpreted harmoniously. The former is a limited waiver of sovereign immunity by *all* federal agencies for the specific purpose of effectuating the current withholding of state income taxes. The latter is the complete waiver of immunity of the Postal Service, making it amenable to the tax garnishment laws of the various states.

III.

The U.S. Postal Service Should Cooperate With the Various States in the Collection of Their Revenues.

It is the long established policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. *Non-resident Taxpayers Assn. v. Municipality*

of Philadelphia, 478 F.2d 456, 459 (3d Cir. 1973). By its arguments herein, the U.S. Postal Service would use 5 U.S.C. section 5517 to shield their employee-debtors from the collection of legitimate state tax liabilities. Such action contravenes the intent of section 5517 which was to further the Federal Government's policy of "cooperat(ing) with the States in the administration of their tax laws to the fullest extent practicable." 2 U.S. Code Cong. and Adm. News, p. 2360 (1952).

With its employees residing in all fifty states, the Postal Service, as a matter of public policy, should recognize its duty of cooperating with the various states. It should not participate in an anomalous situation whereby a statute (5 U.S.C. § 5517), passed for purposes of cooperative tax collection, is misapplied to the hindrance of such cooperation.

The states are not seeking to impose a tax on the Postal Service. Rather, all that is being sought is recognition from the Postal Service of the legitimacy of the various states' summary administrative proceedings to collect taxes—procedures which have consistently been upheld by the United States Supreme Court (see *Bull v. United States*, 295 U.S. 247 (1935); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977)).

The Postal Service, just like any other employer, must respect the propriety and priority of state tax levies. It should not be allowed to inhibit the revenue collection of the various states when such is contrary to federal law and policy.

Conclusion.

The exceptional importance of the collection of state taxes is a matter which cannot be debated. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means of collection of these liabilities must be preserved

not only for appellant but also for every state in which Postal employees reside.

For the reasons as heretofore set forth and for the reasons stated in California's Brief, it is respectfully requested that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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No. 83-372-AFX
Status: GRANTED

Title: Franchise Tax Board of California, Appellant
v.
United States Postal Service

Docketed:
August 31, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for appellant: Kitching, Patti S.

Counsel for appellee: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1983	G	Statement as to jurisdiction filed.
3	Oct 18 1983		Order extending time to file response to jurisdictional statement until November 17, 1983.
4	Nov 16 1983		Order further extending time to file response to jurisdictional statement until December 17, 1983.
5	Dec 13 1983		Motion of appellee U. S. Postal Serv. to dismiss or affirm filed.
6	Dec 14 1983		DISTRIBUTED. January 6, 1984
7	Jan 9 1984		PROBABLE JURISDICTION NOTED. *****
8	Feb 21 1984		Joint appendix filed.
9	Feb 27 1984		Brief amicus curiae of States of Delaware, et al. filed.
10	Feb 29 1984		Brief of appellant Franchise Tax Bd. of CA filed.
11	Mar 19 1984		Record filed.
12	Mar 19 1984		Certified original record & C.A. proceedings, Volumes I, II & III, received.
13	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 17, 1984. (4th case)
14	Apr 3 1984		CIRCULATED.
15	Apr 3 1984	X	Brief of appellee U. S. Postal Serv. filed.
16	Apr 10 1984	X	Reply brief of appellant Franchise Tax Bd. of CA filed.
17	Apr 17 1984		ARGUED.